92-1111

No. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF CINCINNATI and
BOARD OF TRUSTEES RETIREMENT SYSTEM and
SCOTT JOHNSON,

Petitioners,

v.

CITY OF CINCINNATI, ex rel. DAVID KUNTZ
and DAVID KUNTZ,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

PETITION FOR WRIT OF CERTIORARI

JULIE F. BISSINGER
Assistant City Solicitor
and Counsel of Record

FAY D. DUPUIS
City Solicitor

Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334

Counsel for Petitioners
City of Cincinnati,
Board of Trustees Retirement
System and Scott Johnson

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

138 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below, reversing the trial court's denial of attorney's fees under 42 U.S.C.A. Section 1988 and holding that a party who failed in his 42 U.S.C.A. Section 1983 claim was a "prevailing party" under 42 U.S.C.A. Section 1988, even though attorney's fees were available but denied under the state law claim on which plaintiff prevailed, is consistent with this Court's decisions in *Maher v. Gagne*, 448 U.S. 122 (1980) and *Maine v. Thiboutot*, 448 U.S. 1 (1980), and with the congressional intent behind 42 U.S.C.A. Section 1988.

2. Whether this Court should clarify the two-part test articulated in *Maher v. Gagne*, 448 U.S. 122 (1980), and should set forth the requisite degree of substantiality a federal claim must have to award a plaintiff attorney's fees when the plaintiff prevails on a non-fee pendant state law claim in state court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING THE PETITION 6

1. This case poses an important question of Federal law which the lower court decided in a way that conflicts with the applicable decisions of this Court 6

2. The opinion below creates a conflict between various states as to the correct interpretation of *Maher v. Gagne*, 448 U.S. 122 (1980), and the granting of attorney's fees pursuant to 42 U.S.C.A. Section 1988 12

CONCLUSION 16

APPENDIX

Entry of the Supreme Court of Ohio, Case No. 92-1074 (Sept. 23, 1992) 1A

Defendants-Appellants' Memorandum in Support of Jurisdiction (June 1, 1992) 2A-41A

Opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, Appeal Nos. C-910242, C-910263 (Apr. 1, 1992) 42A-59A

Brief of Defendants-Appellees-Cross-Appellants (Sept. 30, 1991) 60A-80A

TABLE OF CONTENTS – Continued

Page

Final Judgment Entry, Court of Common Pleas, Hamilton County, Ohio, Case No. A-8808989 (Apr. 1, 1991) 81A-86A

Defendants' Memorandum Contra Motion for Attorneys' Fees (Jan. 15, 1991)..... 87A-112A

42 U.S.C.A. § 1983..... 113A

42 U.S.C.A. § 1988..... 114A

Ohio Rev. Code Ann. § 733.59..... 115A

Ohio Rev. Code Ann. § 733.61..... 116A

TABLE OF AUTHORITIES

Page

Boland v. City of Rapid City, 315 N.W.2d 496 (S.D. 1982) 12

Doe v. Cuddy, 21 Ohio App. 3d 270, 487 N.E.2d 914 (1st Dist. 1985) 9, 12, 13

Gonzales v. New Mexico Educational Retirement Bd., 788 P.2d 348 (N.M. 1990) 13, 14

Gumbhir v. Kansas State Bd. of Pharmacy, 646 P.2d 1078 (Ka. 1982) 13

Hagens v. Lavine, 415 U.S. 528 (1974) 13

Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980) 8

Hensley v. Eckerhart, 461 U.S. 424 (1983) 10

In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985, 919 F.2d 1079 (5th Cir. 1991), *cert. denied, Connors v. United States*, 112 S.Ct. 276 (1991), *reh'g denied, Connors v. United States*, 112 S.Ct. 622 (1991) 10

Jackson v. Inhabitants of Town of Searsport, 456 A.2d 852 (Me. 1983) 13, 14, 15

Luria Bros. & Co. v. Allen, 672 F.2d 347 (3rd Cir. 1982) 7, 8

Maher v. Gagne, 448 U.S. 122 (1980) 6, 7, 9, 11, 12

Maine v. Thiboutot, 448 U.S. 1 (1980) 7, 15

Monnel v. Dept. of Social Services, 436 U.S. 658 (1978) 14

Paul v. Davis, 424 U.S. 693 (1976) 14

TABLE OF AUTHORITIES – Continued

Page

Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) 15

Raley v. Fraser, 747 F.2d 287 (5th Cir. 1984) 7, 8

Reel v. Arkansas Dept. of Corrections, 672 F.2d 693 (8th Cir. 1982) 7

Roberts v. Mills, 628 P.2d 714 (Or. 1981) 13

Russo v. State of New York, 672 F.2d 1014, *modified*, 721 F.2d 410 (2d Cir. 1982) 8

Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977) 8, 9

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989) 12

ADDITIONAL AUTHORITIES:

42 U.S.C.A. §1988 (1991) 6

Steven H. Steinglass, *Litigating Section 1983 Actions in State Courts*, 420 PLI/Lit 115 (1991) 7

Wolf, *Pendant Jurisdiction, Multiclaim Litigation, and the 1976 Civil Rights Attorney's Fees Award Act*, 2 W. New Eng. L. Rev. 193 (1979) 12

OPINIONS BELOW

The Entry of the Supreme Court of Ohio, Case No. 92-1074 (Sept. 23, 1992) is printed in Petitioner's Appendix at page 1A. The Opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, Appeal Nos. C-910242, C-910263 (Apr. 1, 1992) is printed in Petitioner's Appendix at pages 42A-59A. The Final Judgment Entry of the Court of Common Pleas, Hamilton County, Ohio, Case No. A-8808989 (Apr. 1, 1991) is printed in Petitioner's Appendix at pages 81A-86A.

JURISDICTION

The Entry of the Supreme Court of Ohio, Case No. 92-1074, was entered September 23, 1992.

This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1257(3).

STATEMENT OF THE CASE

Procedural Posture

On October 27, 1988, Respondent David Kuntz (hereinafter Kuntz) filed a two count Complaint in the Court of Common Pleas, Hamilton County, Ohio against Petitioners City of Cincinnati, Board of Trustees Retirement System of the City of Cincinnati and City Manager Scott Johnson (hereinafter collectively City). Kuntz alleged that the City had denied him retirement, sick leave and vacation benefits for the time period June 30, 1968 through June 2, 1973 during which he worked for the City under a

personal services contract. Kuntz stated a taxpayer claim under the laws of the State of Ohio, Ohio Revised Code Sections 733.59 and 733.61, as his first cause of action and a claim under 42 U.S.C.A. Section 1983 for his second cause of action. The Complaint sought injunctive relief and declaratory judgment. On November 3, 1988, Kuntz filed an Amended Complaint not significantly altering the substance of the Complaint.

On February 1, 1989, Kuntz moved for summary judgment. In response, on February 22, 1989, the City filed a Cross-Motion for Summary Judgment. On March 1, 1989, Kuntz filed a reply memorandum to the City's Motion for Summary Judgment.

Following oral argument, on May 8, 1989, the trial court rendered an opinion granting Kuntz's Motion for Summary Judgment and overruling the City's Motion for Summary Judgment. On May 18, 1989, the court entered judgment in favor of Kuntz. (Appendix 84A-86A). On June 14, 1989, the City filed a Notice of Appeal from the trial court's decision.

After briefing and oral argument, the First District Court of Appeals, Hamilton County, Ohio dismissed the appeal for lack of jurisdiction stating the trial court's judgment was not a final appealable order. The Court of Appeals found that the trial court had not ruled upon Kuntz's claim for attorney fees and had not included the language determining that there was no just cause for delaying the finality of the partial adjudication. On October 10, 1990, Kuntz, with the concurrence of the City, moved the Court of Appeals for reconsideration of its

dismissal of the appeal for lack of jurisdiction. On October 30, 1990, the Court of Appeals overruled the Application for Reconsideration.

Upon remand to the trial court, Kuntz moved for an award of attorney fees. Upon due consideration of the memoranda in support and in opposition (Defendants' Memorandum Contra Motion for Attorneys' Fees, Appendix 87A-112A), on April 1, 1991, the trial court reaffirmed its granting summary judgment to Kuntz and denied the application for attorney fees. (Appendix 81A-86A).

On March 28, 1991, Kuntz filed his Notice of Appeal. On April 5, 1991, the City filed its Notice of Appeal. On April 5, 1991, the City moved to stay the judgment of the trial court pending appeal. On April 15, 1991, Kuntz filed an Amended Notice of Appeal. On April 18, 1991, the City filed an Amended Notice of Appeal. On April 22, 1991, the trial court stayed its judgment pending appeal.

On May 20, 1991, Kuntz and the City moved the Court of Appeals to accept the briefs on the underlying issue filed in the previous appeal for this case. On June 3, 1991, the Court of Appeals ordered the briefs filed in the previous appeal to be transferred to the pending appeals.

On June 8, 1991, Kuntz filed a brief addressing his denial of an attorney fee award. The City filed its responsive brief on September 30, 1991. (Brief of Defendants-Appellees-Cross-Appellants, Appendix 60A-80A). Kuntz filed a reply brief on October 10, 1991.

Following oral argument, on April 1, 1992, the Court of Appeals entered its Opinion affirming the trial court's

judgment as it pertained to the underlying issue in the case; affirming the trial court's judgment Kuntz was not entitled to attorney fees under his taxpayer claim, Ohio Revised Code Section 733.61; and reversing the judgment of the trial court pertaining to Kuntz's claim for attorney fees under Section 1988, Title 42, U.S.C.A. (Appendix 42A-59A).

On May 1, 1992, the City filed its Notice of Appeal to the Court of Appeals. The sole issue being appealed by the City was Kuntz's entitlement to attorney fees under Section 1988, Title 42, U.S.C.A.

The City filed Defendants-Appellants' Memorandum in Support of Jurisdiction in the Supreme Court of Ohio on June 1, 1992. (Appendix 2A-41A). Kuntz filed Plaintiffs-Appellees' Memorandum in Support of Jurisdiction on June 29, 1992. On September 23, 1992, the Ohio Supreme Court by Entry declined to accept jurisdiction of this matter. (Appendix 1A).

Statement of Facts

This Statement of Facts was the City's factual position in the courts below. Although the City maintained these facts as correct in its Brief to the Supreme Court of Ohio, for various reasons it decided to settle the underlying issue herein. This factual statement is thus provided primarily for background purposes of the Court.

David Kuntz became employed in the permanent classified civil service of the City of Cincinnati on August 5, 1957. He subsequently left the City's service on November 27, 1965. During his tenure with the City,

Kuntz contributed 6% of his earnings to the City's Retirement System and the City made employer contributions to the Retirement System to fund Kuntz's pension. On December 8, 1965, Kuntz withdrew his accumulated contributions in the City's Retirement System.

On June 30, 1968, Kuntz entered into a personal services contract with the City to perform various services as a Project Administrator with the City's Health Department. From June 30, 1968 through June 2, 1973, he performed such services under a series of contracts, none of which had a duration longer than one year. Kuntz's contracts required compensation in the form of a salary and excluded any retirement, vacation, sick leave or health benefits. Pursuant to the contracts, Kuntz was consistently compensated at a higher rate than permanent classified employees performing the same or similar tasks to offset the exclusion of benefits. At no time during his contract services did Kuntz or the City contribute to the City's Retirement System on his behalf. Kuntz did not question his non-participation in the fund.

On June 3, 1973, Kuntz was employed as a permanent unclassified civil service employee in the position of Business Manager of the Health Department. He was paid at a lesser rate as Business Manager of the entire Health Department than as Project Administrator for managing one specific project for the Health Department on a contract basis.

On January 2, 1987 and February 12, 1987, Kuntz appeared before the Cincinnati Civil Service Commission (hereinafter Commission) requesting a determination of his classification status from June 30, 1968 through June 2,

1973. The Commission approved changing his personnel record to indicate classified civil service status from June 30, 1968 to June 2, 1973. The Commission limited its determination to Kuntz's claim for service credits as a classified employee for purposes of calculating seniority status only. The Commission's ruling did not apply to any associated employee benefits for that time period.

ARGUMENT FOR GRANTING THE PETITION

1. This case poses an important question of Federal law which the lower court decided in a way that conflicts with the applicable decisions of this Court.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. Section 1988, provides in relevant part:

> In any action or proceeding to enforce the provisions of Sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, *in its discretion, may* allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C.A. §1988 (1991) (emphasis added).

In *Maher v. Gagne*, 448 U.S. 122 (1980), this Court held that Congress intended for plaintiffs who prevailed on statutory civil rights claims pendent to a substantial constitutional claim to be entitled to attorney's fees under 42 U.S.C.A. Section 1988. *Id.* at 132. This Court then set forth a two-part analysis which courts were to follow in determining whether a plaintiff was allowed reasonable attorney's fees. First, the pendant constitutional claim must be substantial. Second, the plaintiff must prevail on the non-

fee claim which arises out of a common nucleus of operative fact. *Id.* at 133, n.15. On the same day, this Court decided *Maine v. Thiboutot*, 448 U.S. 1 (1980), and held that the fee provision found in Section 1988 is available whether the action is brought in federal or state court. *Id.* at 10-11.

In the years following these two decisions, state and federal courts have interpreted these two decisions on many occasions, often reaching different results. *See generally* Steven H. Steinglass, *Litigating Section 1983 Actions in State Courts*, 420 PLI/Lit 115 (1991). However, from the interpretations of this Court's decisions, and more specifically, from interpretations of the two-part test set forth in *Maher v. Gagne*, 448 U.S. at 133, n.15, two primary rules have been followed. First, if the plaintiff fails in his federal claim, the plaintiff is not a "prevailing party" under Section 1988 even though he prevails on any or all of his state law claims. Second, only if the plaintiff joins the federal claim with a *non-fee* state claim would the plaintiff be entitled to rely on the two-part test articulated by this Court.

Courts have consistently held that when a plaintiff loses on the federal claim, such a plaintiff is not a "prevailing party" under Section 1988 even though the plaintiff prevails on the pendent state law claims. *See, e.g., Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984) (plaintiff prevailed on pendant state claim of assault and battery); *Luria Bros. & Co. v. Allen*, 672 F.2d 347 (3rd Cir. 1982) (plaintiff prevailed on pendant state claim of landlord-tenant law violation); *Reel v. Arkansas Dept. of Corrections*, 672 F.2d 693 (8th Cir. 1982) (plaintiff prevailed on pendant state claims of assault and false imprisonment);

Russo v. State of New York, 672 F.2d 1014, *modified*, 721 F.2d 410 (2d Cir. 1982) (plaintiff prevailed on pendant state claim of malicious prosecution); and *Haywood v. Ball*, 634 F.2d 740 (4th Cir. 1980) (plaintiff granted grievance hearing pursuant to state law). These cases have distinguished federal courts of appeals' decisions where the trial courts had not addressed the substantial federal claim, but had disposed of the case on other statutory or nonconstitutional grounds. *See, e.g., Haywood*, 634 F.2d at 743; *Raley*, 747 F.2d at 290; and *Luria*, 672 F.2d at 357. Importantly, one of the cases consistently distinguished by the courts of appeals is *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977), the case the appellate court below relied upon to award the plaintiff attorney's fees.

On March 22, 1991, the trial judge below, upon a Motion for Attorney's Fees filed by the plaintiff, and upon due consideration of the motion and supporting affidavits, the Defendants' Memorandum Contra Motion for Attorney's Fees and Plaintiff's Reply to Defendants' Memorandum Contra Motion for Attorney's Fees, found that the plaintiff was not entitled to attorney's fees under 42 U.S.C.A. Section 1988. In reaching this conclusion, the trial judge explicitly stated, "[T]he Court did not grant summary judgment to Plaintiff on his alleged claims brought under 42 U.S.C. §1983; therefore, Plaintiff is not entitled to an award of reasonable attorneys' fees pursuant to 42 U.S.C. §1988. Accordingly, the Court denies the motion for attorney's fees." (Appendix 81A-82A). Clearly the language of the trial court denied the plaintiff's federal claim under 42 U.S.C.A. Section 1983 and therefore, no attorney's fees are warranted under Section 1988.

The court of appeals below reversed the trial court, ignoring the strictures of 42 U.S.C.A. Section 1988 by invoking *Seals v. Quarterly County Court*, 562 F.2d at 390. However, as previously mentioned, in *Seals*, the trial court did not rule upon the constitutional claims presented for resolution and *Seals* is therefore inapplicable to cases such as the matter herein where the trial court specifically denied the plaintiff's federal claims. Yet, the court of appeals below did not comprehend the distinction between the two sets of cases set forth above, and held that as long as the two part test set forth in *Maher v. Gagne*, 448 U.S. at 122, was met, that would be enough to award attorney's fees to a plaintiff prevailing on a state law claim.

Because the court of appeals below did not adequately articulate the reasoning supporting its holding, its analysis must be assessed herein. On the one hand, the appellate court did not explicitly state that the trial court failed to address the plaintiff's federal claims, thus enabling the two-part test set forth in *Maher* to be applied. On the other hand, the court cited the *Seals* decision and its own prior decision in *Doe v. Cuddy*, 21 Ohio App. 3d 270, 487 N.E. 2d 914 (1st Dist. 1985) for the law it relied upon for its holding, cases where attorney's fees were permitted where the plaintiff succeeded on state law claims and the federal claims were not ruled upon. Apparently, although unarticulated, the court of appeals believed that the trial court had not ruled on the federal claims in any manner. However, such a construction is erroneous.

First, the language of the final judgment entry clearly shows that the trial court did deny the plaintiff's federal

claim. Second, before the trial court ruled on the plaintiff's motion for attorney's fees, the trial judge, who has served for 15 years and is a well respected jurist, was briefed by both the plaintiff and defendant and heard argument thereon, and was well versed on the law regarding attorney's fees under Section 1988. *See generally In re Air Crash at Dallas Fort Worth Airport on August 2, 1985*, 919 F.2d 1079, 1086 (5th Cir. 1991), *cert. denied, Connors v. United States*, 112 S.Ct. 276 (1991), *reh'g denied, Connors v. United States*, 112 S.Ct. 622 (1991) (a trial judge who has been on the bench for many years presumably has general knowledge of the law). In other words, the trial judge was aware that if he did not rule on the federal claim, an award of attorney's fees could be proper. In denying attorney's fees under Section 1988, the judge stated he had ruled on, and denied, the plaintiff's federal claim. The judge stated that he did not grant the plaintiff's summary judgment motion on plaintiffs' Section 1983 claims, and "therefore" attorney's fees were not warranted. (Appendix 81A-82A). The use of the word "therefore" shows that the reason for the judge's denial of the attorney's fees was the fact that he denied the plaintiff's federal claim.

A trial court has discretion in determining both to award fees and the amount of fees to award under Section 1988. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). Only if a court of appeals finds an abuse of discretion, that is, more than an error of law or judgment – an implication that a trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable - could the court of appeals reverse the trial judge's denial

of attorney's fees. Nowhere in the court of appeals decision was this standard discussed or applied.

Assuming, **ad arguendo,** that the trial court did not rule upon the plaintiff's federal claim, this case is nonetheless distinguishable from the cases applying the *Maher* test. In this case, the plaintiff joined his 1983 claim with a state claim that did allow attorney's fees. However, the two-part test set forth in *Maher* only applies to cases where the state statute upon which the plaintiff prevails does *not* have a provision for attorney's fees. This point was clearly made in *Maher*, where this Court, quoting the often cited House report as evidence of Congress's intent, set forth the limits of its two part test. This Court stated:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that *does not allow attorney's fees*, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding attorney's fees. (citations omitted).

Maher, 448 U.S. at 133, n.15 (emphasis added) (quoting H.R. Rep. 94-1558, 94th Cong., 2d Sess. p. 4, n.7, 1976, U.S.C.C.A.N. 1976, at 5908) (emphasis added). As is clearly stated by the congressional report, only when the plaintiff joins a claim under Section 1988 with a claim that *does not allow attorney's fees* then would that plaintiff be entitled, if the two-part test is met, to attorney's fees for prevailing under the state claim.

In the case herein, the state statute that the plaintiff prevailed under does allow attorney's fees. (Appendix 116A). However, the trial court and the court of appeals

denied plaintiff's recovery of attorney's fees under the state law because the plaintiff did not meet the criteria necessary under the statute for attorney's fees. The court of appeals was persuaded that an award of attorney's fees under the state law was inappropriate because "Kuntz's action to enforce his benefits did not represent a public benefit." Rather, the plaintiff sought to enforce merely private rights under the state statute. (Appendix 53A). Thus, the plaintiff did not serve the role of a "private attorney general" which Congress meant to promote in enacting the civil rights attorney's fees awards act of 1976. *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989). *See, e.g., Boland v. City of Rapid City*, 315 N.W.2d 496, 503 (S.D. 1982) (attorney's fees denied because of a lack of broad public interest). Plaintiff is therefore not entitled to attorney's fees under 42 U.S.C.A. Section 1988.

2. The opinion below creates a conflict between various states as to the correct interpretation of *Maher v. Gagne*, 448 U.S. 122 (1980), and the granting of attorney's fees pursuant to 42 U.S.C.A. Section 1988.

Much debate has been generated about how substantial a federal claim need be for an award of attorney's fees. *See, e.g.*, Wolf, *Pendant Jurisdiction, Multiclaim Litigation, and the 1976 Civil Rights Attorney's Fees Award Act*, 2 W. New Eng. L. Rev. 193 (1979). In the state courts, there are three lines of cases addressing how substantial a federal claim must be. The first line of cases is exemplified by *Doe v. Cuddy*, 21 Ohio App.3d 271, 487 N.E.2d 914 (1st Dist. 1985), relied upon by the court of appeals

below. Under this test, a federal claim is insubstantial only if it is obviously without merit or obviously unsound. *Id.* at 273, 487 N.E.2d at 915 (citing *Hagens v. Lavine*, 415 U.S. 528 (1974)). Justice Rehnquist responded to this liberal standard of insubstantiality of *Hagens* by stating, "Under today's rationale it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face." *Id.* at 562.

Moreover, this standard is only the threshold test for getting into federal court. Such a standard is not the proper standard state courts should apply when determining whether pendant claims are substantial. *See Jackson v. Inhabitants of Town of Searsport*, 456 A.2d 852, 855, n. 13 (Me. 1983).

The second line of cases differs greatly from the first line of cases. These cases require an analysis of whether the Section 1988 claim is meritorious or is a meritless federal claim attached to a pendent claim. *Id.* at 855-856; and *Gumbhir v. Kansas State Bd. of Pharmacy*, 646 P.2d 1078, 1087 (Ka. 1982) ("We are convinced §1988 is applicable only in instances where the conduct complained of is an actual deprivation of federal rights, privileges and immunities.").

The third line of cases has refused to provide attorney's fees under Section 1988 for plaintiffs who succeed under state claims if the state law provides an adequate remedy. *Roberts v. Mills*, 628 P.2d 714, 715, n.3 (Or. 1981). *See also Gonzales v. New Mexico Educational Retirement Bd.*, 788 P.2d 348 (N.M. 1990), where the court held that where the plaintiff's suit "at bottom was one to interpret and apply those rules and to determine their validity in light

of the governing state statute," attorney's fees would not be awarded for a federal claim that was undecided. *Id.* at 351-352.

The third standard would be an appropriate standard to follow, especially in cases where a plaintiff claims a violation of rights guaranteed by the Due Process Clause of the Fourteenth Amendment, as the plaintiff in the case herein averred. As was noted by the Supreme Court of Maine, this Court has implemented a major shift in its analysis of procedural due process claims. *Jackson*, 456 A.2d at 858-59. The central feature of this shift, which is exemplified by this Court's decisions in *Paul v. Davis*, 424 U.S. 693 (1976), *reh'g denied*, *Paul v. Davis*, 425 U.S. 985 (1976), is a focus on the availability of state law remedies which prevent a deprivation of life, liberty or property from becoming a deprivation without due process. *Jackson*, 456 A.2d at 858-59. Relying on this shift by this Court, the Supreme Court of Maine denied the plaintiff attorney's fees. *Id.* at 859-60.

In this case, it is apparent that the state law afforded the plaintiff an adequate remedy, and also that the plaintiff's alleged federal constitutional violations were nothing more than an attempt to collect attorney's fees under Section 1988.[1]

What the second and third lines of cases have in common is that in this country the American rule, which

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[1] In order to show the City of Cincinnati denied plaintiff due process rights, the plaintiff must have established that the City had a policy that deprived plaintiff of his constitutional rights. *See Monnel v. Dept. of Social Services*, 436 U.S. 658 (1978). Plaintiff made no such showing.

requires each side to pay for his or her own attorney's fees, is still the majority rule throughout the country. To allow attorney's fees under Section 1988 to parties who assert insubstantial federal claims along with a valid state claim would in many cases effectively negate the American rule. *See, e.g., Jackson*, 456 A.2d at 856. As the court recognized, not analyzing plaintiff's federal claim would give plaintiffs every incentive to interject a Section 1983 claim into the action regardless of its validity. As Justice Powell articulated:

> There is some evidence that §1983 claims already are being appended to complaints solely for the purpose of obtaining fees and actions where 'civil rights' of any kind are at best an afterthought. . . . Consequently, ingenious pleaders may find ways to recover attorney's fees in almost any suit against the state defendant. Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress intended to remove so completely the protection of the 'American rule' in suits against state defendants.

Maine v. Thiboutot, 448 U.S. at 25-26 (Powell, J., dissenting).

Surely state courts in adhering to the abstention doctrine set forth by this Court in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), should decide issues that are grounded in state law before deciding attached federal claims under Section 1983. By merely requiring the very liberal standard applied by the courts applying the first line of cases, any plaintiff need only attach a federal claim, no matter how attenuated or nonmeritorious.

The trial court's outright denial of plaintiff's federal claim below clearly demonstrates its lack of merit. Moreover, plaintiff had an adequate remedy under his state law claim. Therefore, his claim for attorney's fees under Section 1988 must fail.

CONCLUSION

For the foregoing reasons, Petitioners request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

JULIE F. BISSINGER
Assistant City Solicitor
and Counsel of Record

FAY D. DUPUIS
City Solicitor

Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334

Counsel for Petitioners
City of Cincinnati,
Board of Trustees Retirement
System and Scott Johnson

THE SUPREME COURT OF OHIO

1992 TERM

To wit: September 23, 1992

City of Cincinnati ex rel. David Kuntz et al., Appellees,	:	Case No. 92-1074
v.	:	ENTRY
City of Cincinnati et al., Appellants.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by City of Cincinnati.

(Court of Appeals Nos. C910242 and C910263)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI, ex rel. DAVID KUNTZ	:	APPEAL NO. 921074
and	:	
DAVID KUNTZ,	:	
Plaintiffs-Appellees	:	
v.	:	
CITY OF CINCINNATI	:	
and	:	
BOARD OF TRUSTEES RETIREMENT SYSTEM	:	
and	:	
SCOTT JOHNSON	:	
Defendants-Appellants	:	

Appeal from the Court of Appeals
First Appellate District
Hamilton County, Ohio

DEFENDANTS-APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

(Filed Jun. 01 1992)

FAY D. DUPUIS (0020782)
City Solicitor

JULIE F. BISSINGER (0012055)
Assistant City Solicitor
Room 214, City Hall
Cincinnati, Ohio 45202
Telephone: (513) 352-3332

Attorney for
Defendants-Appellants

ANDREW S. LIPTON (0009191)
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

Attorneys for
Plaintiffs-Appellees

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

A. Procedural Posture 1

B. Statement of Facts 3

II. ARGUMENT 5

Proposition of Law No. 1

Where Plaintiff is not a prevailing party on his claim brought pursuant to 42 U.S.C.A. Section 1983, he is not entitled to an award of attorney fees pursuant to 42 U.S.C.A. Section 1988 ... 5

Authorities:

42 U.S.C.A. §1988 (1991) 6

Luria Bros. & Co. v. Allen (3rd Cir. 1982), 672 F.2d 347 ..... 6, 7, 8

Haywood v. Ball (4th Cir. 1980), 634 F.2d 740 7

Seals v. Quarterly County Court (6th Cir. 1977), 562 F.2d 390 8

Doe v. Cuddy (1st Dist. 1985), 21 Ohio App. 3d 270, 487 N.E.2d 914 8

Raley v. Fraser (5th Cir. 1984), 747 F.2d 287 ..... 8, 9

Cagne v. Town of Enfield (2d Cir. 1984), 734 F.2d 902 9

Hensley v. Eckerhart (1983), 461 U.S. 424, 103 S.Ct. 1933 9

III. SUBSTANTIAL CONSTITUTIONAL QUESTION/MATTER OF GREAT PUBLIC CONCERN 10

IV. CONCLUSION 10

APPENDIX

Notice of Appeal to the Supreme Court 12

Decision of the Court of Appeals, First Appellate District 14

Opinion of the Court of Common Pleas: Final Judgment Entry 30

Statutes:

42 U.S.C.A. §1988 (1991) 36

I. STATEMENT OF THE CASE

A. Procedural Posture

On October 27, 1988, Plaintiff-Appellee David Kuntz (hereinafter Kuntz) filed a two count Complaint in the Court of Common Pleas against Defendants-Appellants City of Cincinnati, Board of Trustees Retirement System of the City of Cincinnati and City Manager Scott Johnson

(hereinafter collectively City). Kuntz alleged that the City had denied him retirement, sick leave and vacation benefits for the time period June 30, 1968 through June 2, 1973 during which he worked for the City under a personal services contract. Kuntz stated a taxpayer claim under the laws of the State of Ohio as his first cause of action and a claim under 42 U.S.C.A. Section 1983 for his second cause of action. The Complaint sought injunctive relief and declaratory judgment. (T.d. 1). On November 3, 1988, Kuntz filed an Amended Complaint not significantly altering the substance of the Complaint. (T.d. 5).

On February 1, 1989, Kuntz moved for summary Judgment. (T.d. 8). In response, on February 22, 1989, the City filed a Cross-Motion for Summary Judgment. (T.d. 13). On March 1, 1989, Kuntz filed a reply memorandum to the City's Motion for Summary Judgment. (T.d. 14).

Following oral argument, on May 8, 1989, the trial court rendered an opinion granting Kuntz's Motion for Summary Judgment and overruling the City's Motion for Summary Judgment. (Opinion, T.d. 19). On May 18, 1989, the court entered judgment in favor of Kuntz. (T.d. 20). On June 14, 1989, the City filed a Notice of Appeal from the trial court's decision. (T.d. 23).

After briefing and oral argument, the First District Court of Appeals dismissed the appeal for lack of jurisdiction stating the trial court's judgment was not a final appealable order. (T.d. 24). The Court of Appeals found that the trial court had not ruled upon Kuntz's claim for attorney fees and had not included the language determining that there was no just cause for delaying the finality of the partial adjudication. (T.d. 24). On October

10, 1990, Kuntz, with the concurrence of the City, moved the Court of Appeals for reconsideration of its dismissal of the appeal for lack of jurisdiction. On October 30, 1990, the Court of Appeals overruled the application for reconsideration.

Upon remand to the trial court, Kuntz moved for an award of attorney fees. (T.d. 23). Upon due consideration of the memoranda in support and in opposition, on April 1, 1991, the trial court reaffirmed its granting summary judgment to Kuntz and denied the application for attorney fees. (T.d. 29).

On March 28, 1991, Kuntz filed his Notice of Appeal. (T.d. 28). On April 5, 1991, the City filed its Notice of Appeal. (T.d. 30). On April 5, 1991, the City moved to stay the judgment of the trial court pending appeal. (T.d. 31). On April 15, 1991, Kuntz filed an Amended Notice of Appeal. (T.d. 33). On April 18, 1991, the City filed an Amended Notice of Appeal. (T.d. 34). On April 22, 1991, the trial court stayed its judgment pending appeal. (T.d. 35). On May 20, 1991, Kuntz and the City moved the Court of Appeals to accept the briefs filed in the previous appeal for this case. On June 3, 1991, the Court of Appeals ordered the briefs filed in the previous appeal to be transferred to these appeals.

On June 8, 1991, Kuntz filed a Brief addressing his denial of an attorney fee owed. The City filed its responsive Brief on September 30, 1991. Kuntz filed a Reply Brief on October 10, 1991.

Following oral argument, on April 1, 1992, the Court of Appeals entered an opinion affirming the trial court's judgment as it pertained to Kuntz's entitled to retirement

benefits, sick leave and vacation credit; affirming the trial court's judgment Kuntz was not entitled to attorney fees under his taxpayer claim, Ohio Revised Code Section 733.61; and reversing the judgment of the trial court pertaining to Kuntz's claim for attorney fees under Section 1988, Title 42, U.S.C.A.

On May 1, 1992, the City filed its Notice of Appeal to the Court of Appeals. The sole issue being appealed by the City herein is Kuntz's entitlement to attorney fees under Section 1988, Title 42, U.S.C.A.

B. Statement of Facts

This Statement of Facts was the City's factual position in the trial court and in the Court of Appeals. Although the City still maintains these facts are correct, for various reasons it has decided to settle the underlying issue herein. This factual statement is thus provided primarily for background purposes of the Court in deciding the attorney's fee issue.

David Kuntz became employed in the permanent classified civil service of the City of Cincinnati on August 5, 1957. He subsequently left the City's service on November 27, 1965. During his tenure with the City, Kuntz contributed 6% of his earnings to the City's Retirement System and the City made employer contributions to the Retirement System to fund Kuntz's pension. On December 8, 1965, Kuntz withdrew his accumulated contributions in the City's Retirement System. (Affidavit of Fred G. Costa in Support of City of Cincinnati's Motion for Summary Judgment, T.d. 12).

On June 30, 1968, Kuntz entered into a personal services contract with the City to perform various services as a Project Administrator with the City's Health Department. From June 30, 1968 through June 2, 1973, he performed such services under a series of contracts, none of which had a duration longer than one year. Kuntz's contracts required compensation in the form of a salary and excluded any retirement, vacation, sick leave or health benefits. (Contracts for Services, Attachment A to Affidavit of Harry E. Machenheimer in Support of City of Cincinnati's Motion for Summary Judgment, T.d. 11). Pursuant to the contracts, Kuntz was consistently compensated at a higher rate than permanent classified employees performing the same or similar tasks to offset the exclusion of benefits. At no time during his contract services did Kuntz or the City contribute to the City's Retirement System on his behalf. Kuntz did not question his non-participation in the fund. (Affidavit of Fred G. Costa, T.d. 12; Affidavit of Harry E. Machenheimer, T.d. 11; Supplemental Affidavit of Harry E. Machenheimer, T.d. 18).

On June 3, 1973, Kuntz was employed as a permanent unclassified civil service employee in the position of Business Manager of the Health Department. He was paid at a lesser rate as Business Manager of the entire Health Department than as Project Administrator for managing one specific project for the Health Department on a contract basis. (Affidavit of Harry E. Machenheimer, T.d. 11; Supplemental Affidavit of Harry E. Machenheimer, T.d. 18).

On January 2, 1987 and February 12, 1987, Kuntz appeared before the Cincinnati Civil Service Commission

(hereinafter Commission) requesting a determination of his classification status from June 30, 1968 through June 2, 1973. The Commission approved changing his personnel record to indicate classified civil service status from June 30, 1968 to June 2, 1973. The Commission limited its determination to Kuntz's claim for service credits as a classified employee for purposes of calculating seniority status only. The Commission's ruling did not apply to any associated employee benefits for that time period. (Affidavit of Harry E. Machenheimer and Commission Minutes, Attachment C thereto, T.d. 11; Supplemental Affidavit of Harry E. Machenheimer, T.d. 18).

II. ARGUMENT

Proposition of Law No. 1

Where Plaintiff is not a prevailing party on his claim brought pursuant to 42 U.S.C.A. Section 1983, he is not entitled to an award of attorney fees pursuant to 42 U.S.C.A. Section 1988.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. Section 1988, provides in relevant part:

> In any action or proceeding to enforce the provisions of Sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, *in its discretion, may* allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C.A. §1988 (1991) (emphasis added). Before David Kuntz can claim attorney fees under Section 1988, he must first demonstrate to the trial court that he is indeed the "prevailing party."

The trial court very clearly stated that the decision on the merits expressly denied relief for the claims brought pursuant to 42 U.S.C.A. Section 1983. It explicitly ruled upon both the federal claim and the state law claim and concluded that Kuntz was not entitled to attorney fees. (T.d. 29).

This matter, therefore, becomes one of statutory construction: "if, as the result of an adjudication, one is the losing party and not the prevailing party on a §1983 claim, may he be entitled nevertheless to attorney's fees on the strength of his success on a related state law claim? We don't think so." *Luria Bros. & Co. v. Allen* (3rd Cir. 1982), 672 F.2d 347, 357. The statute thus plainly limits fee awards to the "prevailing party."

In *Luria Bros.*, sublessee brought an action against a private landlord alleging that the landlord's posting of a notice of distraint on subleased premises deprived it of its property on the premises in violation of the Federal Civil Rights Act of 1871 – Pennsylvania landlord and tenant law. With respect to an attorney fee award, the Court held that where the plaintiff failed to prevail on its claim that the landlord's distraint of its property was an illegal deprivation of property under color of state law, it could not recover its attorney fees under Section 1988, even though it did prevail on its pendant claim that the distraint violated Pennsylvania state law.

Plaintiff claimed an entitlement to attorney fees under Section 1988 on the basis of a line of cases holding that, even absent judgment for the prevailing party on a Section 1983 claim, recovery under Section 1988 is permitted, if the party successfully asserts a state claim arising

out of a common nucleus of operative fact. The Court found those cases unpersuasive because, like the facts herein, in each case, the successful litigant prevailed on *both* the Federal and pendant claims or the Federal claim was not adjudicated.

The Court stated:

> Here the district court did reach both the federal constitutional question and the related state law question, and here we have concluded that the claimant of the attorney's fees has not prevailed in the §1983 claim.

Id. at 357.

Haywood v. Ball (4th Cir. 1980), 634 F.2d 740, was an appeal from a District Court's denial of attorney's fees to a party who had prevailed on a pendant state negligence claim, but lost on his Section 1983 claim. The Court stated:

> Concededly, the legislative history of the Fees Act supports the award of fees . . . where the trial court has declined to pass upon the constitutional claim. . . . However, we find nothing in the legislative history, or decisions on the subject which would require or justify an award of attorney's fees in a case where the plaintiff has lost on the constitutional issue. . . . Accordingly, the denial of fees in this case was proper.

Id. at 743.

The trial court below expressly ruled that Kuntz was not entitled to any relief on his claim brought pursuant to

U.S.C.A. Section 1983. Therefore, Kuntz is not the prevailing party. In *Luria Bros.*, 672 F.2d at 347, the Court simply and distinctly stated:

> The statute plainly limits fee awards to the 'prevailing party' '[in] any action or proceeding to enforce a provision of [section] 1983.' The losing party is not the prevailing party; what is black cannot be called white. We find no legislative intent to treat a losing party in a §1983 action as a 'prevailing party' simply because he prevails on a related state claim.

Id. at 357.

The Court of Appeals below ignored the strictures of 42 U.S.C.A. Section 1988 by invoking the decisions of *Seals v. Quarterly County Court* (6th Cir. 1977), 562 F.2d 390, and *Doe v. Cuddy* (1st Dist. 1985), 21 Ohio App. 3d 270, 487 N.E.2d 914. However, in both *Seals* and *Doe* the trial court did not rule upon the constitutional claim presented for resolution, a significant distinction from the case at bar. Where a court elects not to rule upon a claim brought pursuant to 42 U.S.C.A. Section 1983, then the trial judge is entitled to look to the two-part analysis adopted in *Seals* for guidance in resolving the question of entitlement to attorney fees as a result of the success achieved and the merits of the state claim. *Id.* at 273, 487 N.E. 2d at 916. The trial court below did not avoid reaching the constitutional issue because a pendant state claim was dispositive; rather, the trial court expressly found that Kuntz had no constitutional claim at all. (T.d. 29). *See Raley v. Fraser* (5th Cir. 1984), 747 F.2d 287 (where plaintiff prevailed on a pendant state claim of assault and battery, but lost on his Section 1983 claims of excessive force and

unlawful arrest, he was not entitled to recover attorney fees under Section 1988); and *Cagne v. Town of Enfield* (2d Cir. 1984), 734 F.2d 902 (plaintiff who prevailed on a state law negligence claim, but who failed to prevail on a Federal civil rights claim, was not entitled to an award of attorney fees under Section 1988).

Having failed to prevail under 42 U.S.C.A. Section 1983, *Kuntz* fails to meet the statutory prerequisite for even applying for attorney fees under 42 U.S.C.A. Section 1988. The trial court properly denied Kuntz's application for attorney fees.

A trial court has discretion in determining both to award fees and the amount of the fee award under Section 1988. *See Hensley v. Eckerhart* (1983), 461 U.S. 424, 103 S.Ct. 1933. Therefore, this Court must reinstate the trial court's judgment to deny attorney fees absent an abuse of discretion. An abuse of discretion connotes more than an error of law or judgment; it implies that a trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable.

Having considered the merits and the application for attorney fees, the trial court did not abuse its discretion in its denial of attorney fees. Accordingly, this Court should reaffirm the decision of the trial court denying the application for attorney fees pursuant to 42 U.S.C.A. Section 1988.

III. SUBSTANTIAL CONSTITUTIONAL QUESTION/ MATTER OF GREAT PUBLIC CONCERN

The outcome of this case will have a profound impact on all cases where a plaintiff brings a Federal Civil Rights claim and pendant state law claim and is successful on the state claim, but unsuccessful on the Federal Civil Rights claim. The rule of law set forth by the First District Court of Appeals effectively grants attorney fees under 42 U.S.C.A. Section 1988 any time a plaintiff is successful on the pendant state claim. Congress clearly could not have intended such a result in enacting the Civil Rights Attorney's Fees Award Act of 1976.

IV. CONCLUSION

Having failed to meet the statutory prerequisites for an attorney fee application pursuant to 42 U.S.C.A. Section 1988, Plaintiff-Appellee David Kuntz is not entitled to an award of attorney fees. The decision of the trial court to deny the application for attorney fees was prudent and in accordance with the well-established law of Ohio and the United States. Accordingly, this Court

should reaffirm the decision of the trial court denying an award of attorney fees to Kuntz.

Respectfully submitted,

/s/ Fay D. Dupuis
FAY D. DUPUIS (0020782)
City Solicitor

/s/ Julie F. Bissinger
JULIE F. BISSINGER
(0012055)
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3332

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Defendants-Appellants in Support of Jurisdiction was sent to Andrew S. Lipton, Manley, Burke & Fischer, 225 West Court Street, Cincinnati, Ohio 45202 on this 29th day of May, 1992 by regular United States Mail.

/s/ Julie F. Bissinger
JULIE F. BISSINGER
Assistant City Solicitor

JFB/ep

FIN-004

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, EX REL. DAVID KUNTZ	:	APPEAL NOS. C-910242 C-910263
and	:	
DAVID KUNTZ,	:	NOTICE OF APPEAL
Plaintiffs-Appellants/ Cross-Appellees,	:	
v.	:	
CITY OF CINCINNATI,	:	
and	:	
BOARD OF TRUSTEES RETIREMENT SYSTEM,	:	
and	:	
SCOTT JOHNSON, MANAGER, CITY OF CINCINNATI,	:	
Defendants-Appellees/ Cross-Appellants.	:	

(Filed May 01, 1992)

Notice is hereby given that Defendants City of Cincinnati, Board of Trustees Retirement System and Scott Johnson hereby appeal to the Supreme Court of Ohio from the judgment entered in this action by the Court of

Appeals for the First Appellate District of Ohio on the 1st day of April, 1992.

Respectfully Submitted,

/s/ Fay D. Dupuis
FAY D. DUPUIS, ESQ.
(D-082) 0020782
City Solicitor
/s/ Julie F. Bissinger
JULIE F. BISSINGER, ESQ.
(B-092) 0012055
Assistant City Solicitor
Attorneys for City of Cincinnati
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
Telephone: 513/352-3332

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent to Andrew S. Lipton, Attorney for Plaintiffs-Appellants/Cross-Appellees, Manley, Burke & Fischer, 225 West Court Street, Cincinnati, Ohio 45202 on this 1st day of May 1992 by regular U.S. mail.

/s/ Julie F. Bissinger
Julie F. Bissinger, Esq.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, EX REL. DAVID KUNTZ	:	APPEAL NOS. C-910242 C-910263
and	:	
DAVID KUNTZ,	:	TRIAL NO. A-8808989
Plaintiffs-Appellants/ Cross-Appellees,	:	OPINION
vs.	:	
CITY OF CINCINNATI,	:	
and	:	
BOARD OF TRUSTEES RETIREMENT SYSTEM,	:	
and	:	
SCOTT JOHNSON, MANAGER, CITY OF CINCINNATI,	:	
Defendants-Appellees/ Cross-Appellants.	:	

(Filed Apr. 1, 1992)

Civil Appeals From:
Hamilton County Court of Common Pleas

Judgments Appealed From are:
Affirmed in C-910263; Affirmed in Part, Reversed in Part and Remanded in C-910242

Date of Judgment Entry on Appeal: April 1, 1992

Manley, Burke & Fischer, Andrew S. Lipton, Esq., No. 009191, and Anne T. Perry, Esq., No. 0038814, 225 West Court Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellants/Cross-Appellees,

Fay Danner DuPuis, City Solicitor, No. 0020782, and James F. McCarthy III, Esq., No. 0002245, Room 214, City Hall, 801 Plum Street. Cincinnati, Ohio 45202, for Defendants-Appellees/Cross-Appellants.

HILDEBRANDT J.,

On October 27, 1988, David Kuntz filed a complaint in the Hamilton County Court of Common Pleas against the within defendants (collectively the "City") in which he sought a declaratory judgment that he was entitled to participate in the City's retirement system, and that he was entitled to sick pay and vacation credit for the period of June 30, 1968, to June 2, 1973; an injunction prohibiting the City from misapplying funds and abusing its powers by refusing to permit Kuntz to participate in the above benefits; and reasonable costs and attorney's fees pursuant to R.C. 733.61 and Section 1988, Title 42, U.S. Code. An amended complaint which sought the same relief was filed on November 3, 1988. On December 19, 1988, the City filed an answer to the amended complaint. Thereafter, Kuntz and the City each filed motions for summary judgment. On May 18, 1989, the trial court granted Kuntz's motion for summary judgment and denied the City's motion. The trial court held as follows:

> 1. The City Civil Service Commission's determination of February 12, 1987, as to the civil service status of plaintiff David Kuntz is binding upon the City of Cincinnati.

2. Plaintiff David Kuntz is entitled to participate as a matter of law in the retirement system with the city as a classified civil servant.

3. Plaintiff David Kuntz is entitled to sick leave and vacation credits by virtue of his classified civil service status from June 30, 1968, through June 2, 1973.

The City appealed the trial court's judgment of May 18, 1989, to this court in appeal number C-890371. That appeal was dismissed on October 3, 1990, because Kuntz's request of attorney's fees was still pending in the trial court, thereby denying this court jurisdiction to consider the City's appeal. *Cincinnati, ex rel. Kuntz, v. Cincinnati* (Oct. 3, 1990), Hamilton App. No. C-890371, unreported.

On April 1, 1991, the trial court denied Kuntz's application for attorney's fees. The court reasoned that Kuntz was not entitled to attorney's fees because he had not demonstrated that his action constituted a sufficient public benefit to warrant an award of attorney's fees under R.C. 733.61. The trial court further stated that "the court finds that in its previous decision entered on May 18, 1989, the court did not grant summary judgment to plaintiff on his alleged claims brought under 42 U.S.C. Section 1983; therefore, plaintiff is not entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. Section 1988." The trial court incorporated by reference its judgment entry dated May 18, 1989, into the judgment entry dated April 1, 1991.

Kuntz appealed to this court, contesting the trial court's denial of his motion for attorney's fees. The City appealed to this court from the trial court's judgment

granting Kuntz the right to participate in the City's retirement plan, sick leave and vacation credit.

The record discloses that Kuntz was employed by the City as a classified civil service employee from August 5, 1957, until November 27, 1965. During that period, Kuntz and the City each made contributions to the City's retirement system in order to fund Kuntz's pension. Subsequent to leaving the City's employ, Kuntz withdrew his accumulated contributions to the City's retirement system. On June 30, 1968, the City hired Kuntz as an administrator in the City's health department. He remained in this position until June 2, 1973. This employment was governed by several personal-service contracts which extended Kuntz's employment for periods of approximately one year. On June 3, 1973, Kuntz became employed as a permanent unclassified civil service employee of the City in the position of business manager for the health department.

On January 29, 1987, Kuntz requested a determination of his employment classification status for the period of June 30, 1968, to June 2, 1973, from the Cincinnati Civil Service Commission (the "Commission"). The Commission issued the following decision on February 12, 1987:

> A legal opinion was obtained form the City Solicitor's Office which stated that under Ohio Civil Service Statutes the category of "contract employee" does not exist and unless Mr. Kuntz was an independent contractor during the period of 6/30/68 to 6/2/73 he is entitled to civil service status by state law. Since Mr. Kuntz was not an independent contractor during the time period in question and since his job duties

> did not fall into one of the specific categories of unclassified employees, Mr. Kuntz should be considered as a classified employee for this time. After review and discussion, the Commission approved changing Mr. Kuntz's personnel record to indicate classified status from 6/30/68 to 6/2/73.

The City did not appeal the Commission's ruling.

On October 12, 1988, the council of the city of Cincinnati passed ordinance 406-1988 for the purpose of :

> Amending section 203-1-E of the Cincinnati Municipal Code to legislatively clarify and affirm that persons who have previously provided personal services to the City of Cincinnati as contract employees are not entitled to retirement service credit for the period of contract service regardless of any employee status under civil service law.

This ordinance provided in pertinent part as follows:

> Subject to the provisions of Section 203-23, "employee" shall not include:
>
> 1. Any person who is employed by a temporary help service or other independent contractor who performs services under the direction of any agent or employee of the city of Cincinnati;
>
> 2. Any person who is employed on a contractual basis by the city of Cincinnati or any of its independent boards, commissions or any other employing agency that participates in the retirement system; and

3. Any person who is employed under a personal service contract by the city of Cincinnati or any of its independent boards, commissions or any other employing agencies that participate in the retirement system.

Eligibility for retirement service credit as an "employee" shall be determined exclusively by the provisions of this chapter regardless of any eligibility for or determination of civil service status.

In cases of doubt, the [retirement] board shall decide who is an employee within the meaning of the ordinance sections governing the retirement systems and may permit any person who was an employee at the time of becoming a member to continue as an employee as long as the person continues as a member in receipt of a regular salary from the city for service. *Any such determination by the board shall be final and conclusive.* [Emphasis ours.]

Appeal Number C-910263

In a single assignment of error on appeal, the City challenges the trial court's granting of Kuntz's motion for summary judgment, which thereby permitted Kuntz to participate in the City's retirement plan, and to receive sick and vacation benefits for the period during which he was employed on a yearly contractual basis. This assignment of error is without merit.

In *State, ex rel. Hanley, v. Roberts* (1985), 17 Ohio St. 3d 1, 5, 476 N.E.2d 1019, 1022, the Ohio Supreme Court stated as follows:

> The form of written entry of a decision of an administrative board should be the written minutes of its meeting at which the decision was rendered. * * * The ten-day period for appeal starts to run at the time when the board's decision has been set forth in writing in its minutes. [Citations omitted.]

The Commission's minutes for February 12, 1987, indicate that the Commission approved Kuntz's application to change his personnel record to indicate classified employment status from June 30, 1968, to June 2, 1973. The City argues that the Commission limited its determination of Kuntz's employment status to determine his service credits for purposes of calculating seniority status, and that the Commission's ruling did not apply to any other associated employee benefits. However, the Commission's minutes do not support this contention, as the Commission did not limit its ruling as to Kuntz's classified status for the period in question in any manner.

The City cites *State, ex rel. Gingrich, v. Fairfield City School Dist. Bd. of Education* (1985), 18 Ohio St. 3d 244, 480 N.E.2d 485, for the proposition that eligibility in a retirement system is not determined by civil service status, but rather by specific retirement eligibility status contained in the appropriate retirement-related chapter of the Cincinnati Municipal Code and the Ohio Revised Code.

The City's reliance upon *Gingrich, supra,* is misplaced. There, the court recognized that:

> A claim by a public employee of entitlement to wages or benefits which are granted by statute or ordinance is actionable in mandamus.

Id. at 245, 480 N.E.2d at 486 (citations omitted). The only other issue before the court was what statute of limitations was applicable to the appellant's claim for back compensation for substitute-teaching credits. The court determined that the six-year statute of limitations in R.C. 2305.07 on actions upon a liability created by statute governed the appellant's claims.

The City further contends that it is the board of trustees of the City's retirement system, and not the civil service commission, that determines an employee's eligibility for retirement service credit. Cincinnati Municipal Code Section 203-1-E, effective August 4, 1979, and prior to the 1988 amendment, provided:

> "Employee" shall mean any officer, agent, servant or employee of the city, not elected, but shall not include officers and employees who receive no salary or nominal salary, except that a student whose employment will not exceed fifteen hundred hours in any calendar year or any new employee not a member at the time of employment, whose employment will not exceed twenty hours per week, or a temporary or emergency employee whose employment will not exceed three calendar months, may be exempt from compulsory membership by filing a written application for exemption from the Public Employees Retirement System within one month after being employed. Such application shall serve to exempt such persons from compulsory membership in the city of Cincinnati retirement system.
>
> In all cases of doubt, the board shall decide who is an employee within the meaning of the

> ordinance sections governing the retirement system, and may permit any person who was an employee at the time of becoming a member, to continue as an employee as long as the person continues as a member in receipt of a regular salary from the city for service.

R.C. 145.03 reads in pertinent part:

> A public employee, as defined in division (A) of section 145.01 of the Revised Code, who is employed by a private temporary help service and performs services under the direction of an employer, as defined in division (D) of section 145.01 of the Revised Code, or who is employed on a contractual basis by such an employer, or who is employed under a personal service contract, does not become a member of the Public Employees Retirement System.

The City's 1988 amendment to Cincinnati Municipal Code Section 203-1-E was as an attempt to align that ordinance with the above-quoted provision of R.C. 145.03. This amendment, effective approximately twenty months after the commission declared Kuntz's employment as classified service for the period in question, does not support the City's position because the commission specifically found that Kuntz was not an independent contractor during the period of June 30, 1968, to June 2, 1973. The City did not appeal this determination by the commission. Accordingly, we hold that the trial court did not err when it determined that Kuntz was eligible to participate in the City's retirement system and to receive vacation credits and sick leave. We, therefore, overrule the City's assignment of error.

Appeal Number C-910242

Kuntz's assignments of error concern his request for attorney's fees. In his first assignment of error, Kuntz argues that the trial court erred by denying attorney's fees in a taxpayer action after it granted his motion for summary judgment. We do not agree.

R.C. 733.59 provides:

> If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

R.C. 733.61 reads:

> If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.

In State, ex rel. White v. Cleveland (1973), 34 Ohio St. 2d 37, 295 N.E.2d 665, the Ohio Supreme Court held in the third paragraph of the syllabus:

> Where the statutory requirements necessary to maintain a taxpayer's action, pursuant to R.C. 733.59, are met or waived, and the action has been brought on behalf of the public and resulted in a public benefit, the equity of the case demands that the trial court exercise its discretion in considering the allowance of attorney fees to the successful taxpayers.

In *State, ex rel. Caspar v. Dayton* (1990), 53 Ohio St. 3d 16, 558 N.E.2d 49, several police officers filed a mandamus action against the city which sought an order directing the city to include prior service with other state political subdivisions for purposes of computing their supplemental vacation benefits. The court in that case determined that the officers were entitled to prevail on their action for the writ. However, that court denied the officers' request for attorney's fees, stating:

> This cause, however, is not a "taxpayer action" as we described it in [*State, ex rel. White, v. Cleveland*]. *White* establishes that to maintain such an action under R.C. 733.59, the taxpayer's aim must be to enforce a public right, regardless of any personal or private motive or advantage. Appellants' action to compel fringe benefits for their own benefit does not represent such an aim. Nor is appellants' right to vacation pay a "public" right. Thus, appellants are not eligible for the attorney fees that R.C. 733.61 makes available at the court's discretion in suits brought pursuant to R.C. 733.59.

From our review of the record, we conclude, as did the Ohio Supreme Court in *Caspar*, that Kuntz's action to enforce his benefits did not represent a public benefit. Accordingly, we hold that the trial court did not abuse its discretion by denying his request for attorney's fees under R.C. 733.61. Kuntz's first assignment of error is overruled.

In his second assignment of error, Kuntz maintains that the trial court erred by failing to award attorney's fees pursuant to Section 1988, Title 42, U.S. Code. This assignment of error is well taken.

Kuntz alleged in his amended complaint that the City's refusal to permit him to participate in employment benefits constituted a violation of his Fourteenth Amendment rights; that City Ordinance 406-1988, as applied to Kuntz, denied him due process of law and deprived him of property without just compensation; and that the City acted under color of state law.

The trial court ruled that it had not granted summary judgment to Kuntz on his section 1983, Title 42, U.S. Code claims and that, therefore, Kuntz was not entitled to an award of reasonable attorney's fees pursuant to Section 1988, Title 42, U.S. Code.

Section 1983, Title 42, U.S. Code reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory for the district of Columbia subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988, Title 42, U.S. Code provides in pertinent part:

> [I]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Doe v. Cuddy* (1985), 21 Ohio App. 3d 270, 487 N.E.2d 914, this court addressed the question of whether the prevailing party whose claims were resolved entirely under state law was entitled to an award of fees based upon the application of Section 1988, Title 42, U.S. Code, which refers only to the enforcement of federally created rights. In *Doe*, the plaintiffs prevailed on the merits of their state-law claims that the denial of general welfare benefits to group home residents under Ohio Adm. Code 5105:1-5-04 was contrary to R.C. 5113.01, which established basic eligibility standards for general relief. The plaintiffs had initially sought relief in federal district court on constitutional claims predicated upon the denial of the general benefits. The federal judge to whom the case was assigned abstained from ruling on the plaintiff's constitutional claims and ordered those proceedings stayed pending the resolution of the state-law claims in state court under the authority of the abstention doctrine of *Railroad Comm. of Texas v. Pullman Co.* (1941); 312 U.S. 496, 61 S. Ct. 643.

After prevailing on their state-law claims in the state court, the plaintiffs in *Doe* requested attorney's fees under the authority of Section 1988, Title 42, U.S. Code, which the trial court granted. In affirming the award of attorney's fees in *Doe*, this court adopted the analysis contained in *Seals v. Quarterly County Court* (C.A. 6, 1977), 562 F.2d 390, in which the sixth circuit court of appeals held that a party that pursued a federal constitutional claim and a state-law claim, but prevailed exclusively on the state-law claim, could be awarded attorney's fees under Section 1988, Title 42, U.S. Code if the state-law claim shared "'a common nucleus of operative fact' with the separate federal claim brought pursuant to Section 1983, Title 42, U.S. Code * * * and if the federal claim was, under the circumstances, a substantial one." *Doe v. Cuddy, supra* at 273, 487 N.E.2d at 917; see, also *Fenton v. Query* (Mar. 18, 1992), Hamilton App. No. C-900899, unreported.

In regard to the substantiality of a claim, this court observed that:

> A claim may be held plainly insubstantial under the test only if it is obviously without merit or if its unsoundness so clearly results from previous judicial decisions that it must be said that the subject is foreclosed and that there is no room for the inference that the question sought to be raised can be a mater of legitimate controversy. [Citations omitted.]

Id. at 273, 487 N.E.2d at 917.

In *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433-34, 103 S. Ct. 1933, 1939-40, a case involving federal constitutional claims, the United States Supreme Court explained:

A plaintiff must be a "prevailing party" to recover an attorney's fee under [Section 1988, Title 42, U.S. Code]. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." [Citation omitted.] This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of the lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

District court also should exclude from this initial fee calculation hours that were not "reasonably expended." [Citation omitted.] Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." [Footnote omitted.] This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

In *Texas State Teachers Assn. v. Garland Independent School District* (1989), 489 U.S. 782, ___, 109 S. Ct. 1486, 1492, the United States Supreme Court further explained:

> Although respondents are correct in pointing out that [*Hensley v. Eckerhart*] did not adopt one particular standard for determining prevailing party status, *Hensley* does indicate that the degree of plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all.
>
> Our decision in *Hensley* is consistent with the congressional intent in this regard. Congress clearly contemplated that interim fee awards would be available "where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." [Citations omitted.] In discussing

> the availability of fees *pendente lite* under [Section 1988, Title 42, U.S. Code], we have indicated that such awards are proper where a party "has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S. Ct. 1987, 1989, 64 L.Ed. 2d 670 (1980). The incongruence of the "central issue" test in light of the clear congressional intent that interim fee awards be available to partially prevailing civil rights plaintiffs is readily apparent. In this case, our summary affirmance of the Court of Appeal's judgment for respondents on the union access issues and for petitioners on the teacher-to-teacher communication issues effectively ended the litigation. Because the Court of Appeals found that petitioners had not succeeded on what it viewed as the central issue in this suit, no fees were awarded. Yet, if petitioners' victory on the teacher-to-teacher communication issue had been only an interim one, with other issues remanded for further proceedings in the district court, petitioners would have been entitled to some fee award for their successful claims under [Section 1988, Title 42, U.S. Code]. Congress cannot have meant "prevailing party" status to depend entirely on the timing of a request for fees: A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.

From our review of the record we believe that there is a nexus between Kuntz's state-law claims, upon which he prevailed, and his constitutional claims. Furthermore, we hold such claims to be substantial. Since Kuntz prevailed

on his state-law claims, we hold that the trial court erred by failing to consider Kuntz's claim for an award of attorney's fees under Section 1988, Title 42, U.S. Code. Accordingly, the second assignment of error is sustained.

To summarize, we affirm the trial court's judgment as it pertains to Kuntz's entitlement to retirement benefits, sick leave, and vacation credit. We further affirm the trial court's ruling that Kuntz was not entitled to attorney's fees under R.C. 733.61. However, we reverse the judgment of the trial court as it pertains to Kuntz's claim for attorney's fees under Section 1988, Title 42, U.S. Code. We therefore, remand this cause to the Hamilton County Court of Common Pleas for further proceedings consistent with this opinion and law.

SHANNON, P.J., and KLUSMEIER, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, ex rel. DAVID KUNTZ and DAVID KUNTZ Plaintiffs vs- CITY OF CINCINNATI, BOARD OF TRUSTEES RETIREMENT SYSTEM and GERALD E. NEWFARMER City Manager Defendants	:	CASE NO. A-8808989 (Judge Fred J. Cartolano) FINAL JUDGMENT ENTRY

(Entered Apr. 1, 1991)

This matter came before the Court upon the Motion for Attorneys' Fees filed on behalf of the Plaintiff David Kuntz. Upon due consideration of the motion and the supporting affidavits, the Defendants' Memorandum Contra Motion for Attorneys' Fees and Plaintiff's Reply to Defendants' Memorandum Contra Motion for Attorneys' Fees, the Court finds that Plaintiff David Kuntz is not entitled to an award of attorneys' fees because the Plaintiff has not demonstrated a sufficient benefit bestowed on the public to warrant such an award pursuant to R.C. 733.61. Further, the Court finds that in its

previous decision entered on May 18, 1989 the Court did not grant summary judgment to Plaintiff on his alleged claims brought under 42 U.S.C. § 1983; therefore, Plaintiff is not entitled to an award of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. Accordingly, the Court denies the motion for attorneys' fees.

On May 18, 1989 the Court entered judgment for Plaintiff in accord with the entry attached hereto and fully incorporated herein by reference. Defendants appealed and the Court of Appeals of the First Appellate District, in a per curiam opinion entered October 3, 1990, dismissed the appeal for lack of jurisdiction. That Court observed that this Court's prior decision was a partial adjudication because the Plaintiff's claim for attorneys' fees had not been ruled upon. Accordingly, the court has now ruled upon all matters and therefore

ORDERS, ADJUDGES AND DECREES, the Court reaffirms and incorporates its previous decision granting summary judgment to Plaintiff and denies Defendants' Motion for Summary Judgment. The Court denies the Plaintiff's requests for attorneys' fees; the Court grants the allowance of costs to be paid by the Defendants.

_____

Judge, Court of
Common Pleas

/s/ Andrew S. Lipton
ANDREW S. LIPTON (L-253)
Trial Attorney for Plaintiff David Kuntz
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

/s/ Fay D. Dupuis
FAY D. DUPUIS (D-082)
Acting City Solicitor

/s/ James F. McCarthy, III
JAMES F. McCARTHY, III (M-524)
Assistant City Solicitor
Trial Attorneys for Defendants
Room 214, City Hall
Cincinnati, Ohio 45202
Telephone: (513) 513-3340

JFM/ep

BDH-015

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, ex rel. DAVID KUNTZ, et al.	:	Case No. A8808989
Plaintiffs	:	Judge Fred J. Cartolano
vs.	:	FINAL JUDGMENT ENTRY
CITY OF CINCINNATI, et al.	:	
Defendants	:	

(Entered May 18, 1989)
(Entered Apr. 1, 1991)

This cause came on for hearing upon the parties' cross motions for summary judgment, memoranda, affidavits, exhibits and arguments of counsel. The court hereby adopts its opinion dated May 8, 1989.

Upon due consideration of the matters before the court, it is hereby ordered, considered and adjudged that there are no genuine issues of material fact and plaintiff is entitled to judgment as a matter of law. Therefore, plaintiff's motion for summary judgment is found to be well taken and is hereby granted; defendants' motion for summary judgment is found to be not well taken and is hereby denied.

In accordance therewith, this court hereby enters a declaratory judgment in favor of plaintiffs that:

1. The Cincinnati Civil Service Commission's determination of February 12, 1987, as to the Civil Service status of plaintiff David Kuntz is binding upon the City of Cincinnati.

2. Plaintiff David Kuntz is entitled to participate as a matter of law in the retirement system with the City of Cincinnati as a classified civil servant.

3. Plaintiff David Kuntz is entitled to sick leave and vacation credits by virtue of his classified Civil Service status from June 30, 1968 through June 2, 1973.

Plaintiff is hereby granted his request for a permanent injunction and the defendants are hereby ordered to do the following:

1. The City shall include plaintiff David Kuntz as a participant in the City of Cincinnati retirement system and shall make its contributions to the retirement system on behalf of plaintiff in a manner that will take into account plaintiff's Civil Service employment with the City from June, 1968 through June, 1973;

2. The City of Cincinnati must grant sick leave and vacation leave credit to plaintiff David Kuntz in a manner that will take into account his Civil Service employment from June, 1968 through June, 1973;

3. The City of Cincinnati must do all things necessary to give retirement credit, sick leave credit, and vacation credit to plaintiff David Kuntz for the period from June, 1968 through June, 1973; and

4. The City of Cincinnati is hereby permanently enjoined from denying plaintiff David Kuntz his right to participate in the defendant City's retirement system, and from denying Mr. Kuntz's entitlement to

sick leave credit and vacation leave credit for the period from June 30, 1968 through June 2, 1973.

This is a final order of the court; however, the court reserves jurisdiction over the issue of whether plaintiff is entitled to attorney fees in this matter. Accordingly, judgment is hereby granted to the plaintiffs, costs to be paid by defendants.

HAVE SEEN:

/s/ Andrew S. Lipton
Andrew S. Lipton
Attorney for Plaintiff
David Kuntz
Manley, Burke & Fischer
4100 Carew Tower
Cincinnati, Ohio 45202

/s/ Julie F. Bissinger
Julie F. Bissinger
Attorney for Defendants
Assistant City Solicitor
City of Cincinnati
214 City Hall
801 Plum Street
Cincinnati, Ohio 45202

6569G/kjw

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, EX REL. DAVID KUNTZ,	:	APPEAL NOS. C-910242
and	:	C-910263
DAVID KUNTZ,	:	TRIAL NO. A-8808989
Plaintiffs-Appellants/ Cross-Appellees,	:	OPINION
vs.	:	
CITY OF CINCINNATI, and	:	
BOARD OF TRUSTEES RETIREMENT SYSTEM, and	:	
SCOTT JOHNSON, MANAGER, CITY OF CINCINNATI,	:	
Defendants-Appellees/ Cross-Appellants.	:	

(Filed Apr. 1, 1992)

Civil Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From are: Affirmed in C-910263; Affirmed in Part, Reversed in Part and Remanded in C-910242

Date of Judgment Entry on Appeal: April 1, 1992

Manley, Burke & Fischer, Andrew S. Lipton, Esq., No. 0009191, and Anne T. Perry, Esq., No. 0038814, 225 West Court Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellants/Cross-Appellees,

Fay Danner DuPuis, City Solicitor, No. 0020782, and James F. McCartny III, Esq., No. 0002245, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202, for Defendants-Appellees/Cross-Appellants.

HILDEBRANDT J.,

On October 27, 1988, David Kuntz filed a complaint in the Hamilton County Court of Common Pleas against the within defendants (collectively the "City") in which he sought a declaratory judgment that he was entitled to participate in the City's retirement system, and that he was entitled to sick pay and vacation credit for the period of June 30, 1968, to June 2, 1973; an injunction prohibiting the City from misapplying funds and abusing its powers by refusing to permit Kuntz to participate in the above benefits; and reasonable costs and attorney's fees pursuant to R.C. 733.61 and Section 1988, Title 42, U.S. Code. An amended complaint which sought the same relief was filed on November 3, 1988. On December 19, 1988, the City filed an answer to the amended complaint. Thereafter, Kuntz and the City each filed motions for summary judgment. On May 18, 1989, the trial court granted Kuntz's motion for summary judgment and denied the City's motion. The trial court held as follows:

> 1. The City Civil Service Commission's determination of February 12, 1987, as to the civil

service status of plaintiff David Kuntz is binding upon the City of Cincinnati.

2. Plaintiff David Kuntz is entitled to participate as a matter of law in the retirement system with the city as a classified civil servant.

3. Plaintiff David Kuntz is entitled to sick leave and vacation credits by virtue of his classified civil service status from June 30, 1968, through June 2, 1973.

The City appealed the trial court's judgment of May 18, 1989, to this court in appeal number C-890371. That appeal was dismissed on October 3, 1990, because Kuntz's request for attorney's fees was still pending in the trial court, thereby denying this court jurisdiction to consider the City's appeal. *Cincinnati, ex rel. Kuntz v. Cincinnati* (Oct. 3, 1990), Hamilton App. No. C-890371, unreported.

On April 1, 1991, the trial court denied Kuntz's application for attorney's fees. The court reasoned that Kuntz was not entitled to attorney's fees because he had not demonstrated that his action constituted a sufficient public benefit to warrant an award of attorney's fees under R.C. 733.61. The trial court further stated that "the court finds that in its previous decision entered on May 18, 1989, the court did not grant summary judgment to plaintiff on his alleged claims brought under 42 U.S.C. Section 1983; therefore, plaintiff is not entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. Section 1988." The trial court incorporated by reference its judgment entry dated May 18, 1989, into the judgment entry dated April 1, 1991.

Kuntz appealed to this court, contesting the trial court's denial of his motion for attorney's fees. The City appealed to this court from the trial court's judgment granting Kuntz the right to participate in the city's retirement plan, sick leave and vacation credit.

The record discloses that Kuntz was employed by the City as a classified civil service employee from August 5, 1957, until November 27, 1965. During that period, Kuntz and the City each made contributions to the City's retirement system in order to fund Kuntz's pension. Subsequent to leaving the City's employ, Kuntz withdrew his accumulated contributions to the City's retirement system. On June 30, 1968, the City hired Kuntz as an administrator in the City's health department. He remained in this position until June 2, 1973. This employment was governed by several personal-service contracts which extended Kuntz's employment for periods of approximately one year. On June 3, 1973, Kuntz became employed as a permanent unclassified civil service employee of the City in the position of business manager for the health department.

On January 29, 1987, Kuntz requested a determination of his employment classification status for the period of June 30, 1968, to June 2, 1973, from the Cincinnati Civil Service Commission (the "Commission"). The Commission issued the following decision on February 12, 1987:

> A legal opinion was obtained from the City Solicitor's Office which stated that under Ohio Civil Service Statutes the category of "contract employee" does not exist and unless Mr. Kuntz was an independent contractor during the period of 6/30/68 to 6/2/73 he is entitled to civil service status by state law. Since Mr. Kuntz

was not an independent contractor during the time period in question and since his job duties did not fall into one of the specific categories of unclassified employees, Mr. Kuntz should be considered as a classified employee for this time. After review and discussion, the Commission approved changing Mr. Kuntz's personnel record to indicate classified status from 6/30/68 to 6/2/73.

The City did not appeal the Commission's ruling.

On October 12, 1988, the council of the city of Cincinnati passed ordinance 406-1988 for the purpose of:

> Amending section 203-1-E of the Cincinnati Municipal Code to legislatively clarify and affirm that persons who have previously provided personal services to the City of Cincinnati as contract employees are not entitled to retirement service credit for the period of contract service regardless of any employee status under civil service law.

This ordinance provided in pertinent part as follows:

> Subject to the provisions of Section 203-23, "employee" shall not include:
>
> 1. Any person who is employed by a temporary help service or other independent contractor who performs services under the direction of any agent or employee of the city of Cincinnati;
>
> 2. Any person who is employed on a contractual basis by the city of Cincinnati or any of its independent boards, commissions or any other employing agency that participates in the retirement system; and

3. Any person who is employed under a personal service contract by the city of Cincinnati or any of its independent boards, commissions or any other employing agencies that participate in the retirement system.

Eligibility for retirement service credit as an "employee" shall be determined exclusively by the provisions of this chapter regardless of any eligibility for or determination of civil service status.

In cases of doubt, the [retirement] board shall decide who is an employee within the meaning of the ordinance sections governing the retirement systems and may permit any person who was an employee at the time of becoming a member to continue as an employee as long as the person continues as a member in receipt of a regular salary from the city for service. *Any such determination by the board shall be final and conclusive.* [Emphasis ours.]

Appeal Number C-910263

In a single assignment of error on appeal, the City challenges the trial court's granting of Kuntz's motion for summary judgment, which thereby permitted Kuntz to participate in the City's retirement plan, and to receive sick and vacation benefits for the period during which he was employed on a yearly contractual basis. This assignment of error is without merit.

In *State, ex rel. Hanley, v. Roberts* (1985), 17 Ohio St. 3d 1,–5, 476 N.E.2d 1019, 1022, the Ohio Supreme Court stated as follows:

> The form of written entry of a decision of an administrative board should be the written minutes of its meeting at which the decision was rendered. * * * The ten-day period for appeal starts to run at the time when the board's decision has been set forth in writing in its minutes. [Citations omitted.]

The Commission's minutes for February 12, 1987, indicate that the Commission approved Kuntz's application to change his personnel record to indicate classified employment status from June 30, 1968, to June 2, 1973. The City argues that the Commission limited its determination of Kuntz's employment status to determine his service credits for purposes of calculating seniority status, and that the Commission's ruling did not apply to any other associated employee benefits. However, the Commission's minutes do not support this contention, as the Commission did not limit its ruling as to Kuntz's classified status for the period in question in any manner.

The City cites *State, ex rel. Gingrich, v. Fairfield City School Dist. Bd. of Education* (1985), 18 Ohio St. 3d 244, 480 N.E.2d 485, for the proposition that eligibility in a retirement system is not determined by civil service status, but rather by specific retirement eligibility status contained in the appropriate retirement-related chapter of the Cincinnati Municipal Code and the Ohio Revised Code.

The City's reliance upon *Gingrich, supra,* is misplaced. There, the court recognized that:

> A claim by a public employee of entitlement to wages or benefits which are granted by statute or ordinance is actionable in mandamus.

Id. at 245, 480 N.E.2d at 486 (citations omitted). The only other issue before the court was what statute of limitations was applicable to the appellant's claim for back compensation for substitute-teaching credits. The court determined that the six-year statute of limitations in R.C. 2305.07 on actions upon a liability created by statute governed the appellant's claims.

The City further contends that it is the board of trustees of the City's retirement system, and not the civil service commission, that determines an employee's eligibility for retirement service credit. Cincinnati Municipal Code Section 203-1-E, effective August 4, 1979, and prior to the 1988 amendment, provided:

> "Employee" shall mean any officer, agent, servant or employee of the city, not elected, but shall not include officers and employees who receive no salary or nominal salary, except that a student whose employment will not exceed fifteen hundred hours in any calendar year or any new employee not a member at the time of employment, whose employment will not exceed twenty hours per week, or a temporary or emergency employee whose employment will not exceed three calendar months, may be exempt from compulsory membership by filing a written application for exemption from the Public Employees Retirement System within one month after being employed. Such application shall serve to exempt such persons from compulsory membership in the city of Cincinnati retirement system.
>
> In all cases of doubt, the board shall decide who is an employee within the meaning of the

> ordinance sections governing the retirement system, and may permit any person who was an employee at the time of becoming a member, to continue as an employee as long as the person continues as a member in receipt of a regular salary from the city for service.

R.C. 145.03 reads in pertinent part:

> A public employee, as defined in division (A) of section 145.01 of the Revised Code, who is employed by a private temporary help service and performs services under the direction of an employer, as defined in division (D) of section 145.01 of the Revised Code, or who is employed on a contractual basis by such an employer, or who is employed under a personal service contract, does not become a member of the Public Employees Retirement System.

The City's 1988 amendment to Cincinnati Municipal Code Section 203-1-E was as an attempt to align that ordinance with the above-quoted provision of R.C. 145.03. This amendment, effective approximately twenty months after the commission declared Kuntz's employment as classified service for the period in question, does not support the City's position because the commission specifically found that Kuntz was not an independent contractor during the period of June 30, 1968, to June 2, 1973. The City did not appeal this determination by the commission. Accordingly, we hold that the trial court did not err when it determined that Kuntz was eligible to participate in the City's retirement system and to receive vacation credits and sick leave. We, therefore, overrule the City's assignment of error.

Appeal Number C-910242

Kuntz's assignments of error concern his request for attorney's fees. In his first assignment of error, Kuntz argues that the trial court erred by denying attorney's fees in a taxpayer action after it granted his motion for summary judgment. We do not agree.

R.C. 733.59 provides:

> If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

R.C. 733.61 reads:

> If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.

In *State, ex rel. White v. Cleveland* (1973), 34 Ohio St. 2d 37, 295 N.E.2d 665, the Ohio Supreme Court held in the third paragraph of the syllabus:

> Where the statutory requirements necessary to maintain a taxpayer's action, pursuant to R.C. 733.59, are met or waived, and the action has been brought on behalf of the public and resulted in a public benefit, the equity of the case demands that the trial court exercise its discretion in considering the allowance of attorney fees to the successful taxpayers.

In *State, ex rel. Caspar, v. Dayton* (1990), 53 Ohio St. 3d 16, 558 N.E.2d 49, several police officers filed a mandamus action against the city which sought an order directing the city to include prior service with other state political subdivisions for purposes of computing their supplemental vacation benefits. The court in that case determined that the officers were entitled to prevail on their action for the writ. However, that court denied the officers' request for attorney's fees, stating:

> This cause, however, is not a "taxpayer action" as we described it in [*State, ex rel. White, v. Cleveland*]. *White* establishes that to maintain such an action under R.C. 733.59, the taxpayer's aim must be to enforce a public right, regardless of any personal or private motive or advantage. Appellants' action to compel fringe benefits for their own benefit does not represent such an aim. Nor is appellants' right to vacation pay a "public" right. Thus, appellants are not eligible for the attorney fees that R.C. 733.61 makes available at the court's discretion in suits brought pursuant to R.C. 733.59.

From our review of the record, we conclude, as did the Ohio Supreme Court in *Caspar*, that Kuntz's action to enforce his benefits did not represent a public benefit. Accordingly, we hold that the trial court did not abuse its discretion by denying his request for attorney's fees under R.C. 733.61. Kuntz's first assignment of error is overruled.

In his second assignment of error, Kuntz maintains that the trial court erred by failing to award attorney's fees pursuant to Section 1988, Title 42, U.S. Code. This assignment of error is well taken.

Kuntz alleged in his amended complaint that the City's refusal to permit him to participate in employment benefits constituted a violation of his Fourteenth Amendment rights; that City Ordinance 406-1988, as applied to Kuntz, denied him due process of law and deprived him of property without just compensation; and that the City acted under color of state law.

The trial court ruled that it had not granted summary judgment to Kuntz on his Section 1983, Title 42, U.S. Code claims and that, therefore, Kuntz was not entitled to an award of reasonable attorney's fees pursuant to Section 1988, Title 42, U.S. Code.

Section 1983, Title 42, U.S. Code reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory for the district of Columbia subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or the proper proceeding for redress.

Section 1988, Title 42, U.S. Code provides in pertinent part:

> [I]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Doe v. Cuddy* (1985), 21 Ohio App. 3d 270, 487 N.E.2d 914, this court addressed the question of whether the prevailing party whose claims were resolved entirely under state law was entitled to an award of fees based upon the application of Section 1988, Title 42, U.S. Code, which refers only to the enforcement of federally created rights. In *Doe*, the plaintiffs prevailed on the merits of their state-law claims that the denial of general welfare benefits to group home residents under Ohio Adm. Code 5101:1-5-04 was contrary to R.C. 5113.01, which established basic eligibility standards for general relief. The plaintiffs had initially sought relief in federal district court on constitutional claims predicated upon the denial of the general benefits. The federal judge to whom the case was assigned abstained from ruling on the plaintiffs' constitutional claims and ordered those proceedings stayed pending the resolution of the state-law claims in state court under the authority of the abstention doctrine of *Railroad Comm. of Texas v. Pullman Co.* (1941), 312 U.S. 496, 61 S. Ct. 643.

After prevailing on their state-law claims in the state court, the plaintiffs in *Doe* requested attorney's fees under the authority of Section 1988, Title 42, U.S. Code, which the trial court granted. In affirming the award of attorney's fees in *Doe*, this court adopted the analysis contained in *Seals v. Quarterly County Court* (C.A. 6, 1977), 562 F.2d 390, in which the sixth circuit court of appeals held that a party that pursued a federal constitutional claim and a state-law claim, but prevailed exclusively on the state-law claim, could be awarded attorney's fees under Section 1988, Title 42, U.S. Code if the state-law claim shared " 'a common nucleus of operative fact' with the separate federal claim brought pursuant to Section 1983, Title 42, U.S. Code * * * and if the federal claim was, under the circumstances, a substantial one." *Doe v. Cuddy, supra* at 273, 487 N.E.2d at 917; see, also, *Fenton v. Query* (Mar. 18, 1992), Hamilton App. No. C-900899, unreported.

In regard to the substantiality of a claim, this court observed that:

> A claim may be held plainly insubstantial under the test only if it is obviously without merit or if its unsoundness so clearly results from previous judicial decisions that it must be said that the subject is foreclosed and that there is no room for the inference that the question sought to be raised can be a matter of legitimate controversy. [Citations omitted.]

Id. at 273, 487 N.E.2d at 917.

In *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433-34, 103 S. Ct. 1933, 1939-40, a case involving federal constitutional claims, the United States Supreme Court explained:

A plaintiff must be a "prevailing party" to recover an attorney's fee under [Section 1988, Title 42, U.S. Code]. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." [Citation omitted.] This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of the lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

District court also should exclude from this initial fee calculation hours that were not "reasonably expended." [Citation omitted.] Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

* * *

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." [Footnote omitted.] This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

In *Texas State Teachers Assn. v. Garland Independent School District* (1988), 489 U.S. 782, ___, 109 S. Ct. 1486, 1492, the United States Supreme Court further explained:

> Although respondents are correct in pointing out that [*Hensley v. Eckerhart*] did not adopt one particular standard for determining prevailing party status, *Hensley* does indicate that the degree of plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all.
>
> Our decision in *Hensley* is consistent with the congressional intent in this regard. Congress clearly contemplated that interim fee awards would be available "where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." [Citations omitted.] In discussing

> the availability of fees *pendente lite* under [Section 1988, Title 42, U.S. Code], we have indicated that such awards are proper where a party "has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S. Ct. 1987, 1989, 64 L.Ed. 2d 670 (1980). The incongruence of the "central issue" test in light of the clear congressional intent that interim fee awards be available to partially prevailing civil rights plaintiffs is readily apparent. In this case, our summary affirmance of the Court of Appeal's judgment for respondents on the union access issues and for petitioners on the teacher-to-teacher communication issues effectively ended the litigation. Because the Court of Appeals found that petitioners had not succeeded on what it viewed as the central issue in this suit, no fees were awarded. Yet, if petitioners' victory on the teacher-to-teacher communication issue had been only an interim one, with other issues remanded for further proceedings in the district court, petitioners would have been entitled to some fee award for their successful claims under [Section 1988, Title 42, U.S. Code]. Congress cannot have meant "prevailing party" status to depend entirely on the timing of a request for fees: A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.

From our review of the record we believe that there is a nexus between Kuntz's state-law claims, upon which he prevailed, and his constitutional claims. Furthermore, we hold such claims to be substantial. Since Kuntz prevailed

on his state-law claims, we hold that the trial court erred by failing to consider Kuntz's claim for an award of attorney's fees under Section 1988, Title 42, U.S. Code. Accordingly, the second assignment of error is sustained.

To summarize, we affirm the trial court's judgment as it pertains to Kuntz's entitlement to retirement benefits, sick leave, and vacation credit. We further affirm the trial court's ruling that Kuntz was not entitled to attorney's fees under R.C. 733.61. However, we reverse the judgment of the trial court as it pertains to Kuntz's claim for attorney's fees under Section 1988, Title 42, U.S. Code. We, therefore, remand this cause to the Hamilton County Court of Common Pleas for further proceedings consistent with this opinion and law.

SHANNON, P.J., and KLUSMEIER, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

CASE NOS. C-910242
C-910263

CITY OF CINCINNATI, ex rel.
DAVID KUNTZ, et al.,

Plaintiffs-Appellants-
Cross-Appellees

-v-

CITY OF CINCINNATI, et al.,

Defendants-Appellees-
Cross-Appellants

BRIEF OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS

(Filed Sep. 30, 1991)

FAY DANNER DUPUIS
City Solicitor

JAMES F. MCCARTHY III
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3340

Counsel for
Defendants-Appellees
Cross-Appellants

ANDREW S. LIPTON
Anne T. Perry
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

Counsel for
Plaintiffs-Appellants
Cross-Appellees

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

A. Procedural Posture 1

B. Statement of Facts 3

II. ARGUMENT 4

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING ATTORNEY FEES IN A TAXPAYER ACTION AFTER GRANTING PLAINTIFF-APPELLEE'S (sic) MOTION FOR SUMMARY JUDGMENT 4

A. Issue Presented for Review

Where a plaintiff has failed to meet the statutory prerequisites, has failed to bring the action for the benefit of the public, and has not obtained a sufficient tangible result for the benefit of the public, the trial court correctly exercises its discretion to deny an application for attorney fees 4

Authorities:

Billington -v- Cotner, 37 Ohio St. 2d 17, 18, 305 N.E.2d 805 (1974) 10

Brauer -v- City of Cleveland, 7 Ohio St. 2d 94, 218 N.E.2d 599, cert. denied 386 U.S. 956 (1966) .. 6, 7, 10

Jennison -v- Village of Euclid, 30 O.L.R. 150, 155 (Ct. Ap. Cuyahoga Cty. 1929) 7

State, ex rel. Caspar -v- Dayton, 53 Ohio St. 3d 16, 20, 558 N.E.2d 49 (1990) 5, 8

State, ex rel. Crockett -v- Robinson, 67 Ohio St. 2d 363, 423 N.E.2d 1099 5

State, ex rel. Fox -v- Cuyahoga Cty. Hosp. System, 39 Ohio St. 3d 108, 112; 529 N.E.2d 443 (1988) 11

State, ex rel. Hirshler -v- Frazier, 63 Ohio St. 333, 410 N.E.2d 1263 (1980) 11

State, ex rel. Kabatek -v- Stackhouse, 6 Ohio St. 3d 55, 451 N.E.2d 248 (1983)..... 5

State, ex rel. White -v- Cleveland, 34 Ohio St. 2d 37, 42; 295 N.E.2d 665 (1973) 6, 7, 8

Revised Code, 733.56 6

Revised Code, 733.59 ..... 5, 6, 8

Revised Code, 733.61 .....5, 6, 10, 11, 15

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1983 (sic)..... 12

Issue Presented for Review

Where plaintiff is not a prevailing party on his claim brought pursuant to 42 U.S.C. §1983, he is not entitled to an award of attorney fees pursuant to 42 U.S.C. §1988, and the trial court did not err in denying him an application for fees pursuant to 42 U.S.C. §1988..... 12

Authorities:

Blakemore -v- Blakemore, 5 Ohio St. 3d 217, 219 450 N.E.2d 1140 (1983) 15

Doe -v- Cuddy (1985), 21 Ohio App. 3d 270, 487 N.E.2d 914 .....13, 14

Hensley -v- Eckerhart, 461 U.S. 424; 103 S.Ct. 1933 (1983) 14

Luria Bros. & Co. -v- Allen, 672 F.2d 347, 357 (3rd Cir. 1982) 13, 14

Raley -v- Fraser, 747 F.2d 287 (5th Cir. 1984)..... 14

Seals -v- Quarterly County Court, 562 F.2d 390 (1977) 13, 14

42 U.S.C., Section 1983 ..... 12, 13, 14, 15

42 U.S.C., Section 1988 ..... 12, 13, 14, 15

I. STATEMENT OF THE CASE

A. Procedural Posture

On October 27, 1988, Plaintiff-Appellant-Cross Appellee David Kuntz (hereinafter "Kuntz") filed a two count Complaint in the Court of Common Pleas against Defendants-Appellees-Cross-Appellants City of Cincinnati, Board of Trustees Retirement System of the City of Cincinnati and City Manager Scott Johnson (hereinafter collectively "City"). Kuntz alleged that the City had denied him retirement, sick leave and vacation benefits for the time period June 30, 1968 through June 2, 1973 during which he worked for the City under a personal services contract. Kuntz stated a claim under the laws of the State of Ohio as his first cause of action and a claim under 42 U.S.C. §1983 for his second cause of action. The Complaint sought injunctive relief and declaratory judgment. (Complaint, T.d. 1). On November 3, 1988, Kuntz filed an Amended Complaint not significantly altering the substance of the Complaint. (Amended Complaint, T.d. 5).

On February 1, 1989, Kuntz moved for summary judgment. (T.d. 8). In response, on February 22, 1989, the City filed a cross-motion for summary judgment. (T.d. 13). On March 1, 1989, Kuntz filed a reply memorandum to the City's Motion for Summary Judgment. (T.d. 14).

Following oral argument, on May 8, 1989, the trial court rendered an opinion granting Kuntz's motion for summary judgment and overruling the City's motion for summary judgment. (Opinion, T.d. 19). On May 18, 1989, the court entered judgment in favor of Kuntz. (T.d. 20). On June 14, 1989, the City filed a Notice of Appeal from the trial court's judgment. (T.d. 23).

After briefing and oral argument, this Court dismissed the appeal for lack of jurisdiction because the trial court's judgment was not a final appealable order. (T.d. 24). This Court found that the trial court had not ruled upon Kuntz's claim for attorney fees and had not included the language determining that there was no just cause for delaying the finality of the partial adjudication. (T.d. 24). On October 10, 1990, Kuntz, with the concurrence of the City, moved the Court for reconsideration of its dismissal of the appeal for lack of jurisdiction. On October 30, 1990, the Court overruled the application for reconsideration.

Upon remand to the trial court, Kuntz moved for an award of attorney fees. (T.d. 23). Upon due consideration of the memoranda in support and in opposition, the Court denied the request for attorney fees. (T.d. 29). On April 1, 1991, the trial court reaffirmed its granting summary judgment to Kuntz and denied the application for attorney fees. (T.d. 29).

On March 28, 1991, Kuntz filed his Notice of Appeal. (T.d. 28). On April 5, 1991, the City filed its notice of appeal. (T.d. 30). On April 5, 1991, the City moved to stay the judgment of the Court pending appeal. (T.d. 31). On April 15, 1991, Kuntz filed an amended notice of appeal. (T.d. 33). On April 18, 1991, the City filed an amended notice of appeal. (T.d. 34). On April 22, 1991, the trial court stayed its judgment pending appeal. (T.d. 35). On May 20, 1991, Kuntz and the City moved this Court to accept the briefs filed in the previous appeal for this case. On June 3, 1991, this Court ordered the briefs filed in the previous appeal to be transferred to these appeals.

B. Statement of Facts

Kuntz became employed in the permanent classified civil service of the City of Cincinnati on August 5, 1957. He subsequently left the City's service on November 27, 1965. During his tenure with the City, Kuntz contributed 6% of his earnings to the City's Retirement System and the City made employer contributions to the Retirement System to fund Kuntz's pension. On December 8, 1965, Kuntz withdrew his accumulated contributions in the City's Retirement System. (Affidavit of Fred G. Costa in Support of City of Cincinnati's Motion for Summary Judgment, T.d. 12).

On June 30, 1968, Kuntz entered into a personal services contract with the City to perform various services as a Project Administrator with the City's Health Department. From June 30, 1968 through June 2, 1973, he performed such services under a series of contracts, none of which had a duration longer than one year. Kuntz's

contracts required compensation in the form of a salary and excluded any retirement, vacation, sick leave or health benefits. (Contracts for Services, Attachment A to Affidavit of Harry E. Machenheimer in Support of City of Cincinnati's Motion for Summary Judgment, T.d. 11). Pursuant to the contracts, Kuntz was consistently compensated at a higher rate than permanent classified employees performing the same or similar tasks to offset the exclusion of benefits. At no time during his contract services did Kuntz or the City contribute to the City's Retirement System on his behalf. Kuntz did not question his non-participation in the fund. (Affidavit of Fred G. Costa, T.d. 12; Affidavit of Harry E. Machenheimer, T.d. 11; Supplemental Affidavit of Harry E. Machenheimer, T.d. 18).

On June 3, 1973, Kuntz was employed as a permanent unclassified civil service employee in the position of Business Manager of the Health Department. He was paid at a lesser rate as Business Manager of the entire Health Department than as Project Administrator for managing one specific project for the Health Department on a contract basis. (Affidavit of Harry E. Machenheimer, T.d. 11; Supplemental Affidavit of Harry E. Machenheimer, T.d. 18).

On January 2, 1987 and February 12, 1987, Kuntz appeared before the Cincinnati Civil Service Commission (hereinafter Commission) requesting a determination of his classification status from June 30, 1968 through June 2, 1973. The Commission approved changing his personnel record to indicate classified civil service status from June 30, 1968 to June 2, 1973. The Commission limited its determination to Kuntz's claim for service credits as a

classified employee for purposes of calculating seniority status only. The Commission's ruling did not apply to any associated employee benefits for that time period. (Affidavit of Harry E. Machenheimer and Commission Minutes, Attachment C thereto, T.d. 11; Supplemental Affidavit of Harry E. Machenheimer, T.d. 18).

II. ARGUMENT

APPELLANT'S FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING ATTORNEY FEES IN A TAXPAYER ACTION AFTER GRANTING PLAINTIFF-APPELLEE'S (sic) MOTION FOR SUMMARY JUDGMENT

A. Issue Presented for Review

Where a plaintiff has failed to meet the statutory prerequisites, has failed to bring the action for the benefit of the public, and has not obtained a sufficient tangible result for the benefit of the public, the trial court correctly exercises its discretion to deny an application for attorney fees.

"The general rule in Ohio is that, absent a statutory provision allowing attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith." *State, ex rel. Kabatek -v- Stackhouse* (1983), 6 Ohio St. 3d 55, 451 N.E.2d 248. This concise statement of the "American rule" is well founded in the law of Ohio. *State, ex rel. Caspar -v- Dayton* (1990), 53 Ohio St. 3d 16, 20, 558 N.E.2d 49; see also *State, ex rel. Crockett*

-v- Robinson, 67 Ohio St. 2d 363, 423 N.E.2d 1099. Therefore, failure to adhere to the statutory prerequisites for awarding attorney fees as costs warrants the trial court to deny such an application. *State, ex rel. Caspar -v- Dayton, Id.*

Kuntz claims to have brought this lawsuit, in part, as a taxpayer pursuant to R.C. 733.59, which provides:

> If the village solicitor or city director of law fails upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

In conjunction with R.C. 733.59, the trial court is authorized to award to a taxpayer as part of the costs of such an action, a reasonable compensation for the attorney. R.C. 733.61 provides in pertinent part:

> In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed as part of the costs, a reasonable compensation for his attorney.

The Ohio Supreme Court has authorized a trial court to exercise its discretion to allow attorney fees pursuant to R.C. §733.61 when the action meets four specific criteria. *Brauer -v- City of Cleveland* (1966), 7 Ohio St. 2d 94, 218

N.E.2d 599, cert. denied 386 U.S. 956. In *Brauer -v- Cleveland*, the Ohio Supreme Court enumerated the criteria required for an allowance of attorneys' fees pursuant to R.C. §733.61: (1) the statutory requirements are met or waived; (2) the action has been brought on behalf of the public; (3) the action has resulted in a public benefit; and (4) the equity of the case demands it. *Id.; State, ex rel. White -v- Cleveland* (1973), 34 Ohio St. 2d 37, 42; 295 N.E.2d 665. A seriatum application of each criteria to this action demonstrates that Kuntz is not entitled to an allowance of attorney fees.

A. Statutory Requirements.

R.C. 733.59 enumerates four prerequisites to instituting a taxpayer's action on behalf of a municipal corporation: (1) a written request of the taxpayer to the city solicitor; (2) to make an application provided for in sections 733.56 to 733.58 of the Revised Code; (3) the city solicitor fails to make the application; (4) the taxpayer gives security for the cost of the proceeding.

Rather than a record amply demonstrating compliance with these prerequisites, Kuntz offers this Court excuses for his failure to comply. Rather than a written request for an application pursuant to R.C. 733.56, Kuntz offers the Court unsubstantiated rationalization about negotiating with the City Solicitor. The futility is not in the City Solicitor but in Kuntz for failing to post the required security for the cost of the proceeding. Kuntz offers this Court no explanation for his failure to comply with the express statutory requirement of security. Having failed to comply with each of the prerequisites, Kuntz

has no taxpayer action pending for which he might recover attorney fees.

B. Action on Behalf of the Public

The right to maintain an action as a taxpayer is a privilege recognizable and exercisable only in a public capacity. 88 Ohio Jur. 3d, Taxpayer's Actions, §3. "It is not a right peculiar to a taxpayer which forms the basis of commencing a suit . . . , for the action must be founded upon a right that belongs to the city and to protect that right the action may be begun by a taxpayer." *Jennison -v- Village of Euclid*, 30 O.L.R. 150, 155 (Ct. Ap. Cuyahoga Cty. 1929); see also *State, ex rel. White -v- Cleveland (1983)*, 34 Ohio St. 2d 37; 295 N.E.2d 665.

In the Final Judgment Entry, the trial court declared that:

* * *

2. Plaintiff David Kuntz is entitled to participate as a matter of law in the retirement system with the City of Cincinnati as a classified civil servant.

3. Plaintiff David Kuntz is entitled to sick leave and vacation credits by virtue of his classified Civil Service status from June 30, 1968 through June 2, 1973.

The rights declared in this judgment are not rights of the City, but are rights asserted for the exclusive benefit of Kuntz. This Court should echo the conclusion of the Ohio Supreme Court in *Brauer -v- Cleveland*:

> We observe that the rights protected were private rights as opposed to public rights. The action filed was primarily for the benefit of the plaintiff's own interests. No public money or property is involved.
>
> 7 Ohio St. 2d at 96.

To maintain an action under R.C. 733.59, "the taxpayer's aim must be to enforce a public right, regardless of any personal or private motive or advantage." *State, ex rel. Caspar -v- Dayton* (1990), 53 Ohio St. 3d 16, 20, 558 N.E.2d 49. Kuntz's aim was to compel certain fringe benefits, including retirement, vacation and sick credit for certain years when he worked under a personal services contract. The Ohio Supreme Court has stated unequivocally that an aim to compel fringe benefits is not a taxpayer's action under R.C. 733.59. *State, ex rel. Caspar -v- Dayton, Id.* In *Caspar,* certain members of the Dayton Police Department brought an action in mandamus to compel the City of Dayton to credit them vacation leave. While the Supreme Court affirmed the mandamus for credit, the Court denied any award of attorney fees under R.C. 733.61. The Court reasoned:

> This cause, however, is not a "taxpayer action" as we described it in [*State, ex rel. White -v- Cleveland (1973), 34 Ohio St. 2d 37, 295 N.E.2d 665*]. *White* establishes that to maintain such an action under R.C. 733.59, the taxpayer's aim must be to enforce a public right, regardless of any personal or private motive or advantage. Appellant's action to compel fringe benefits for their own benefit does not represent such an aim. Nor is appellants' right to vacation pay a "public" right. Thus, appellants are not eligible

> for the attorney fees that R.C. 733.61 makes available at the court's discretion in suits brought pursuant to R.C. 733.59.
>
> *Id.*, 53 Ohio St. 3d at 20.

Kuntz's claim for employee fringe benefits similarly does not aim to enforce any public right. Kuntz's right to employee credit is not a public right.

C. Result in a Public Benefit.

In its Final Judgment Entry, trial court granted to Kuntz a permanent injunction ordering:

> 1. The City shall include plaintiff David Kuntz as a participant in the City of Cincinnati retirement system and shall make its contributions to the retirement system on behalf of plaintiff in a manner that will take into account plaintiff's Civil Service employment with the City from June, 1968 through June, 1973;
>
> 2. The City of Cincinnati must grant sick leave and vacation leave credit to plaintiff David Kuntz in a manner that will take into account his Civil Service employment from June, 1968 through June, 1973;
>
> 3. The City of Cincinnati must do all things necessary to give retirement credit, sick leave credit, and vacation credit to plaintiff David Kuntz for the period from June, 1968 through June, 1973;
>
> * * *

This explicit remedy inured exclusively for the benefit of this plaintiff. Nothing contained in the trial court's

mandatory injunction bestowed upon the taxpayers of the City of Cincinnati any benefit, tangible or intangible. There was no tax savings in this case. There was no arrest of a misapplication of government funds. This was not a class action for the benefit of other civil service employees similarly situated. The trial court set no precedent or created new law for the public. This decision was limited to the resolution of this plaintiff's rights to benefits as a classified civil service employee of the City of Cincinnati. Therefore, the remedies which Kuntz has procured through this action are exclusively for his benefit and bestow no benefit upon the taxpayers of the City of Cincinnati.

Kuntz's exaggeration of the trial court's decision bespeaks his desperation, because Kuntz simply has not obtained a benefit for the public. A simple examination of the Final Judgment Entry does not disclose any "strengthening of the powers of the Civil Service Commission." (Appellant's Brief, p. 12). The trial court granted summary judgment to Kuntz and ordered that he be given certain benefits. Nothing in that decision inures to the benefit of the Commission. In fact, the merits of this appeal warrant reversal because the trial court exceeded, rather than confirmed, the Commission's decision giving only seniority to Kuntz.

Kuntz's rationale for a public benefit leads to the absurd result of every lawsuit against a municipality could be a taxpayer's action. The plaintiff in an auto accident with a municipal vehicle could claim that the traffic laws have been strengthened. Every plaintiff in a contract lawsuit with a municipality could claim an arrest of improper expenditure of public funds. The trial court's

mandatory injunction did not inure to any benefit but Kuntz!

D. Fees Are a Matter of Equity Within the Discretion of the Court.

An allowance of attorney fees as part of the costs awarded pursuant to R.C. 733.61 is permissive and "is a matter which lies entirely within the sound discretion of the trial judge." *Billington -v- Cotner* (1974), 37 Ohio St. 2d 17, 18, 305 N.E.2d 805. In exercising that discretion, the Supreme Court admonished the trial judges of Ohio to make such orders as the equity of the cases demand pursuant to the mandate embodied in R.C. 733.61. *Brauer -v- City of Cleveland* (1966), 7 Ohio St. 2d 94, 96, 218 N.E.2d 599, cert. denied 386 U.S. 956. In *Brauer*, the Court observed that "[i]t would be inequitable to pay the plaintiff's counsel with public funds–in a case in which the public obtains no benefit." 7 Ohio St. 2d at 96.

A trial court should deny an application for attorney fees pursuant to R.C. 733.61 not only when the public obtains no benefit but also when " . . . there has not been demonstrated a sufficient benefit, tangible or intangible, bestowed on the public to warrant such an award." *State, ex rel. Hirshler -v- Frazier* (1980), 63 Ohio St. 333, 410 N.E.2d 1263. Therefore, Kuntz must not only demonstrate that a benefit has been obtained for the taxpayers of the City of Cincinnati, but also the benefit is substantial to warrant a reasonable compensation for his attorney. An examination of the trial court's Final Judgment Entry reflects the scarcity of any public benefit. The Court's declaratory judgment and mandatory injunction reflect

remedies available to Kuntz as an individual rather than a representative. No substantial benefit has been bestowed upon the public in this case to warrant an award of attorneys' fees.

In *State, ex rel. Hirshler -v- Frazier,* the Supreme Court held that the relators must demonstrate a sufficient benefit to the public to warrant the award of attorneys' fees. *State, ex rel. Fox -v- Cuyahoga Cty. Hosp. System (1988),* 39 Ohio St. 3d 108, 112; 529 N.E.2d 443. In *Fox,* the Ohio Supreme Court added criteria for the trial court's consideration in exercising its discretion: (1) the reasonableness of the City's response to the taxpayer's request; and (2) the good faith of the City in raising the legal issues in response to the taxpayer's request. In *Fox,* the Supreme Court stated:

> We have held in *State, ex rel. Hirshler,* supra, that the relators must demonstrate a sufficient benefit to the public to warrant the award of attorney fees. The court may also consider the reasonableness of respondents' refusal to comply, since attorney fees are regarded as punitive. Respondents argue that they acted in good faith and presented serious legal issues regarding the Hospital System's obligation to open its records to the public. We find no evidence of bad faith on the part of respondents. There was a reasonable legal basis for respondent's refusal to produce the requested documents and relators' prayer for attorney fees is therefore denied.
>
> 39 Ohio St. 3d at 112.

In the case at bar, the City acted in good faith and had a reasonable legal basis for refusing to give Kuntz any participation in the retirement system, sick leave

credit and vacation credit for his employment from June 30, 1968 to June 2, 1973. The City's legal reasoning was sound and its response to Kuntz was in good faith. Nothing presented to this Court evidences bad faith or an unreasonable response to the taxpayer warranting a punitive award of attorney fees.

APPELLANT'S SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1983 (sic).

Issue Presented for Review

Where plaintiff is not a prevailing party on his claim brought pursuant to 42 U.S.C. §1983, he is not entitled to an award of attorney fees pursuant to 42 U.S.C. §1988, and the trial court did not err in denying him an application for fees pursuant to 42 U.S.C. §1988.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, provides that a court may, in its discretion, allow a prevailing party, other than the United States, reasonable attorney fees in an action brought under specified civil rights statutes, including 42 U.S.C. §1983. Before Kuntz could make any claim for attorney fees under §1988, he must demonstrate to the trial court that he is in fact the "prevailing party." Kuntz attempts to evade this statutory prerequisite with an invocation of the federal abstension doctrine, which is completely inapposite to this case.

The trial court very clearly stated that the decision on the merits expressly denied relief for the claims brought

under 42 U.S.C. §1983. The trial court explicitly ruled upon both the federal claim and the state law claim and concluded that Kuntz was not entitled to attorney fees. Therefore, this case reduces itself to one of statutory construction: "if, as a result of an adjudication, one is the losing and not the prevailing party on a §1983 claim, may he be entitled nevertheless to attorney's fees on the strength of his success on a related state law claim?" *Luria Bros. & Co. -v- Allen*, 672 F.2d 347, 357 (3rd Cir. 1982). The statute plainly limits fee awards to "the prevailing party". The trial court expressly ruled that Kuntz was not entitled to any relief on his claim brought pursuant to 42 U.S.C. §1983. Therefore, Kuntz is not the prevailing party. "The statute plainly limits fee awards to 'the prevailing party' '[in] any action or proceeding to enforce a provision of [section] 1983.' The losing party is not the prevailing party; what is black cannot be called white." *Luria Bros. & Co. -v- Allen*, 672 F.2d at 357.

Kuntz attempts to evade the strictures of 42 U.S.C. §1988 by invoking the decisions of the United States Court of Appeals for the Sixth Circuit and this Court in *Seals -v- Quarterly County Court*, 562 F.2d 390 (1977) and *Doe -v- Cuddy* (1985), 21 Ohio App. 3d 270, 487 N.E.2d 914, respectively. However, in both *Seals* and *Doe*, the trial court did not rule upon the constitutional claim presented for resolution. This fact is a significant distinction from the case at bar. Where a court elects not to rule upon a claim brought pursuant to 42 U.S.C. §1983, then, the trial judge is entitled to look to the two-part analysis adopted in *Seals* for guidance in resolving the question of entitlement to attorney fees as a result of the success achieved and the merits of the state claim. *Doe -v- Cuddy*, 21 Ohio

App. 3d at 273. However, the trial court did not avoid reaching the constitutional issue because of a pendant state claim which was dispositive. Rather, the trial court expressly found that Kuntz had no constitutional claim at all. *Raley -v- Fraser*, 747 F.2d 287 (5th Cir. 1984).

While Kuntz cites this Court to the legislative history of Section 1988, there is no legislative intent to treat a losing party in a Section 1983 action as a "prevailing party" simply because he prevails on a related state claim. *Luria Bros. & Co. -v- Allen*, 672 F.2d at 357.

Having failed to prevail under 42 U.S.C. §1983, Kuntz fails to meet the statutory prerequisite for applying for attorney fees under 42 U.S.C. §1988. Kuntz simply did not prevail on his §1983 claim, and accordingly he is not entitled to attorney fees under 42 U.S.C. §1988. The trial court properly denied Kuntz's application for attorney fees.

The trial court has discretion in determining both to award fees and the amount of the fee award under Section 1988. See *Hensley -v- Eckerhart*, 461 U.S. 424; 103 S.Ct. 1933 (1983). Therefore, this Court cannot reverse the trial court's judgment to deny attorney fees absent an abuse of discretion. "An abuse of discretion connotes more than an error of law or judgment; it implies that a trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable." Having considered the merits and the application for attorney fees, the trial court did not abuse its discretion in its denial of attorney fees. Accordingly, this court should affirm the decision of the trial court denying the application for attorney fees pursuant to 42 U.S.C. §1988.

III. CONCLUSION

Having failed to meet the statutory prerequisites for an attorney fee application pursuant to both R.C. 733.61 and 42 U.S.C. §1988, Kuntz is not entitled to any award of attorney fees. The decision of the trial court to deny the application for attorney fees was prudent and in accordance with the well-established law of Ohio and the United States. Accordingly, this Court should affirm the decision of the trial court denying an award of attorney fees to Kuntz.

Respectfully submitted,

/s/ _____
FAY D. DUPUIS
City Solicitor

/s/ _____
JAMES F. MCCARTHY III
Chief Trial Counsel
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3340

Counsel for Defendants-
Appellees Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Defendants-Appellees Cross-Appellants was sent to Andrew S. Lipton, Manley, Burke & Fischer, 225 West

Court Street, Cincinnati, Ohio 45202 on this 30th day of September, 1991 by ordinary United States mail.

/s/ _____
JAMES F. MCCARTHY III
Chief Trial Counsel

JFM/chs

BDH-003

9/30/91

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, ex rel. DAVID KUNTZ and DAVID KUNTZ Plaintiffs vs- CITY OF CINCINNATI, BOARD OF TRUSTEES RETIREMENT SYSTEM and GERALD E. NEWFARMER City Manager Defendants	CASE NO. A-8808989 (Judge Fred J. Cartolano) FINAL JUDGMENT ENTRY

(Entered Apr. 1, 1991)

This matter came before the Court upon the Motion for Attorneys' Fees filed on behalf of the Plaintiff David Kuntz. Upon due consideration of the motion and the supporting affidavits, the Defendants' Memorandum Contra Motion for Attorneys' Fees and Plaintiff's Reply to Defendants' Memorandum Contra Motion for Attorneys' Fees, the Court finds that Plaintiff David Kuntz is not entitled to an award of attorneys' fees because the Plaintiff has not demonstrated a sufficient benefit bestowed on the public to warrant such an award pursuant to R.C. 733.61. Further, the Court finds that in its previous decision entered on May 18, 1989 the Court did

not grant summary judgment to Plaintiff on his alleged claims brought under 42 U.S.C. §1983; therefore, Plaintiff is not entitled to an award of reasonable attorneys' fees pursuant to 42 U.S.C. §1988. Accordingly, the Court denies the motion for attorneys' fees.

On May 18, 1989 the Court entered judgment for Plaintiff in accord with the entry attached hereto and fully incorporated herein by reference. Defendants appealed and the Court of Appeals of the First Appellate District, in a per curiam opinion entered October 3, 1990, dismissed the appeal for lack of jurisdiction. That Court observed that this Court's prior decision was a partial adjudication because the Plaintiff's claim for attorneys' fees had not been ruled upon. Accordingly, the Court has now ruled upon all matters and therefore

ORDERS, ADJUDGES and DECREES, the Court reaffirms and incorporates its previous decision granting summary judgment to Plaintiff and denies Defendants' Motion for Summary Judgment. The Court denies the Plaintiff's requests for attorney's fees; the Court grants the allowance of costs to be paid by the Defendants.

_____

Judge, Court of Common Pleas

/s/ A.S. Lipton
ANDREW S. LIPTON (L-253)
Trial Attorney for Plaintiff David Kuntz
Manley, Burke & Fisher
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

/s/ Fay D. Dupuis
FAY D. DUPUIS (D-082)
Acting City Solicitor

/s/ James F. McCarthy III
JAMES F. McCARTHY, III (M-524)
Assistant City Solicitor
Trial Attorneys for Defendants
Room 214, City Hall
Cincinnati, Ohio 45202
Telephone: (513) 513-3340

JFM/ep

BDH-015

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, ex rel. DAVID KUNTZ, et al. Plaintiffs	:	Case No. A8808989
	:	Judge Fred J. Cartolano
vs.	:	FINAL JUDGMENT ENTRY
CITY OF CINCINNATI, et al. Defendants	:	

(Entered May 18, 1989)
(Entered Apr. 1, 1991)

This cause came on for hearing upon the parties' cross motions for summary judgment, memoranda, affidavits, exhibits and arguments of counsel. The court hereby adopts its opinion dated May 8, 1989.

Upon due consideration of the matters before the court, it is hereby ordered, considered and adjudged that there are no genuine issues of material fact and plaintiff is entitled to judgment as a matter of law. Therefore, plaintiff's motion for summary judgment is found to be well taken and is hereby granted; defendants' motion for summary judgment is found to be not well taken and is hereby denied.

In accordance therewith, this court hereby enters a declaratory judgment in favor of plaintiffs that:

1. The Cincinnati Civil Service Commission's determination of February 12, 1987, as to the Civil Service status of plaintiff David Kuntz is binding upon the City of Cincinnati.

2. Plaintiff David Kuntz is entitled to participate as a matter of law in the retirement system with the City of Cincinnati as a classified civil servant.

3. Plaintiff David Kuntz is entitled to sick leave and vacation credits by virtue of his classified Civil Service status from June 30, 1968 through June 2, 1973.

Plaintiff is hereby granted his request for a permanent injunction and the defendants are hereby ordered to do the following:

1. The City shall include plaintiff David Kuntz as a participant in the City of Cincinnati retirement system and shall make its contributions to the retirement system on behalf of plaintiff in a manner that will take into account plaintiff's Civil Service employment with the City from June, 1968 through June, 1973;

2. The City of Cincinnati must grant sick leave and vacation leave credit to plaintiff David Kuntz in a manner that will take into account his Civil Service employment from June, 1968 through June, 1973;

3. The City of Cincinnati must do all things necessary to give retirement credit, sick leave credit, and vacation credit to plaintiff David Kuntz for the period from June, 1968 through June, 1973; and

4. The City of Cincinnati is hereby permanently enjoined from denying plaintiff David Kuntz his right to participate in the defendant City's retirement system, and from denying Mr. Kuntz's entitlement to

sick leave credit and vacation leave credit for the period from June 30, 1968 through June 2, 1973.

This is a final order of the court; however, the court reserves jurisdiction over the issue of whether plaintiff is entitled to attorney fees in this matter. Accordingly, judgment is hereby granted to the plaintiffs, costs to be paid by defendants.

HAVE SEEN:

/S/ Andrew S. Lipton
Andrew S. Lipton
Attorney for plaintiff
David Kuntz
Manley, Burke & Fisher
4100 Carew Tower
Cincinnati, Ohio 45202

/s/ Julie F. Bissinger
Julie F. Bissinger
Attorney for Defendants
Assistant City Solicitor
City of Cincinnati
214 City Hall
801 Plum Street
Cincinnati, Ohio 45202

6569G/kjw

M-524
Attorney for Defendants

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, ex rel. DAVID KUNTZ, et al.,	:	CASE NO. A-8808989
Plaintiffs	:	(Judge Fred J. Cartolano)
-vs-	:	
CITY OF CINCINNATI, et al.,	:	DEFENDANTS' MEMORANDUM CONTRA
Defendants	:	MOTION FOR ATTORNEYS'
	:	FEES

(Filed Jan. 15, 1991)

Plaintiff David Kuntz ("Plaintiff") has moved this honorable Court for an order of costs, including attorneys' fees, in the amount of $12,090.35. Plaintiff's application for attorneys fees amounts to $11,740.00 and costs in the amount of $350.35. Plaintiff makes his application for attorneys fees pursuant to both Section 733.61, Ohio Revised Code, and 42 U.S.C. Section 1988. Under either statute, Plaintiff is not entitled to a reasonable attorneys' fee and, accordingly, Plaintiff's motion should be denied.

I. TAXPAYER'S ACTION

Plaintiff allegedly brought this action as a taxpayer pursuant to R.C. § 733.59, which provides in pertinent part:

> If the solicitor fails, upon the written request of any taxpayer of such municipal corporation, to make any application provided for in sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the municipal corporation.

In conjunction with R.C. § 733.59, R.C. § 733.61 provides in pertinent part:

> In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed as part of the costs, a reasonable compensation for his attorney.

The Ohio Supreme Court has authorized a trial court to exercise its discretion to allow attorneys' fees pursuant to R.C. § 733.61 when the action meets four specific criteria. *Brauer vs. City of Cleveland* (1966), 7 Ohio St. 2d 94, 218 N.E.2d 599, cert. denied 386 U.S. 956. In *Brauer vs. Cleveland*, the Ohio Supreme Court enumerated the criteria required for an allowance of attorneys' fees pursuant to R.C. § 733.61: (1) the statutory requirements are met or waived; (2) the action has been brought on behalf of the public; (3) the action has resulted in a public benefit; and (4) the equity of the case demands it. *Id.; State, ex rel. White vs. Cleveland* (1973), 34 Ohio St. 2d 37-42; 295 N.E.2d 665. A seriatum application of each criteria to this action demonstrates that Plaintiff is not entitled to an allowance of attorneys' fees.

A. Statutory Requirements.

A written request to the City Solicitor and the failure of the City Solicitor to proceed pursuant to such request within a reasonable time after receiving it are conditions

precedent to the right of a taxpayer to institute an action under R.C. § 733.59. In this case, Plaintiff merely alleges that he has not complied with the statutory prerequisites because to do so would be futile. An exception to the statutory request requirement exists where it reasonably appears at the time suit is filed that such a request would be futile. *Thelander vs. Cleveland*, 3 Ohio App. 3d 86; 444 N.E.2d 14 (Cuyahoga Cty. 1981). In this action, Plaintiff has not demonstrated to this Court that it reasonably appeared at the time that he filed this action that a written request to the City Solicitor would be futile. Absent such demonstration, Plaintiff's alleged futility is unsubstantiated and, therefore, he has not complied with the statutory prerequisites in filing this taxpayer's action.

B. Action On Behalf of the Public.

The right to maintain an action as a taxpayer is a privilege recognizable and exercisable only in a public capacity. 88 Ohio Jur. 3d, Taxpayer's Actions, § 3. "It is not a right peculiar to a taxpayer which forms the basis of commencing a suit like the one at bar, for the action must be founded upon a right that belongs to the city and to protect that right the action may be begun by a taxpayer." *Jennison vs. Village of Euclid*, 30 O.L.R. 150, 155 (Ct. Ap. Cuyahoga Cty. 1929).

In the Final Judgment Entry, this Court declared that:

* * *

2. Plaintiff David Kuntz is entitled to participate as a matter of law in the retirement system with the City of Cincinnati as a classified civil servant.

3. Plaintiff David Kuntz is entitled to sick leave and vacation credits by virtue of his classified Civil Service status from June 30, 1968 through June 2, 1973.

The rights declared in this judgment are not rights of the City, but are rights asserted for the benefit of Plaintiff. This court should echo the conclusions of the Ohio Supreme Court in *Brauer vs. Cleveland:*

> We observe that the rights protected were private rights as opposed to public rights. The action filed was primarily for the benefit of the plaintiff's own interests. No public money or property is involved.
>
> 7 Ohio St. 2d at 96.

Would this Court seriously consider an action brought on behalf of the City of Cincinnati to compel the Board of Trustees of the Retirement System to recognize Plaintiff's right to participate in the retirement system and to be entitled to certain sick leave and vacation credits? The question begs the obvious answer. The rights asserted work solely for the benefit of Plaintiff.

C. Result in a Public Benefit.

In its Final Judgment Entry, this Court granted to Plaintiff a permanent injunction ordering:

> 1. The City shall include plaintiff David Kuntz as a participant in the City of Cincinnati retirement system and shall make its contributions to the retirement system on behalf of plaintiff in a manner that will take into account plaintiff's Civil Service employment with the City from June, 1968 through June, 1973;

2. The City of Cincinnati must grant sick leave and vacation leave credit to plaintiff David Kuntz in a manner that will take into account his Civil Service employment from June, 1968 through June, 1973;

3. The City of Cincinnati must do all things necessary to give retirement credit, sick leave credit, and vacation credit to plaintiff David Kuntz for the period from June, 1968 through June, 1973; and

This explicit remedy inures exclusively for the benefit of this Plaintiff. Nothing contained in this Court's mandatory injunction bestowes upon the taxpayers of the City of Cincinnati any benefit, tangible or intangible. There is no tax savings in this case. There was no arrest of a misapplication of government funds. Therefore, the remedies which the Plaintiff has procured through this action are exclusively for his benefit and bestow no benefit upon the taxpayers of the City of Cincinnati.

D. Fees Are a Matter of Equity Within the Discretion of the Court.

An allowance of attorneys' fees as part of the costs awarded pursuant to R.C. § 733.61 is permissive and "is a matter which lies entirely within the sound discretion of the trial judge." *Billington vs. Cotner* (1974), 37 Ohio St. 2d 17, 18, 305 N.E.2d 805. In exercising that discretion, the Supreme Court admonished the trial judges of Ohio to make such orders as the equity of the cases demand pursuant to the mandate embodied in R.C. § 733.61. *Brauer vs. City of Cleveland* (1966), 7 Ohio St. 2d 94, 96, 218 N.E.2d 599, cert. denied 386 U.S. 956. In *Brauer*, the Court

observed that "[i]t would be inequitable to pay the plaintiff's counsel with public funds in a case in which the public obtains no benefit." 7 Ohio St. 2d at 96.

A trial court should deny an application for attorneys' fees pursuant to R.C. § 733.61 not only when the public obtains no benefit, but also when " . . . there has not been demonstrated a sufficient benefit, tangible or intangible, bestowed on the public to warrant such an award." *State, ex rel. Hirshler vs. Frazier* (1980), 63 Ohio St. 333, 410 N.E.2d 1263. Therefore, the Plaintiff must not only demonstrate to this Court that a benefit has been obtained for the taxpayers of the City of Cincinnati, but also the benefit is substantial to warrant a reasonable compensation for his attorney. An examination of this honorable Court's Final Judgment Entry reflects the the scarcity of any public benefit. The Court's declaratory judgment and mandatory injunction reflect remedies available to the Plaintiff as an individual rather than a representative. No substantial benefit has been bestowed upon the public in this case to warrant an award of attorneys' fees.

In *State, ex rel. Hirshler vs. Frazier,* the Supreme Court held that the relators must demonstrate a sufficient benefit to the public to warrant the award of attorneys' fees. *State, ex rel. Fox vs. Cuyahoga Cty. Hosp. System* (1988), 39 Ohio St. 3d 108, 112; 529 N.E.2d 443. In *Fox,* the Ohio Supreme Court added criteria for the trial court's consideration in making the discretionary decision: (1) the reasonableness of the City' response to the taxpayer's request; and (2) the good faith of the City in raising the legal issues in response to the taxpayer's request. In *Fox,* the Supreme Court stated:

> We have held in *State, ex rel. Hirshler,* supra, that the relators must demonstrate a sufficient benefit to the public to warrant the award of attorney fees. The court may also consider the reasonableness of respondents' refusal to comply, since attorney fees are regarded as punitive. Respondents argue that they acted in good faith and presented serious legal issues regarding the Hospital System's obligation to open its records to the public. We find no evidence of bad faith on the part of respondents. There was a reasonable legal basis for respondent's refusal to produce the requested documents and relators' prayer for attorney fees is therefore denied.
>
> 39 Ohio St. 3d at 112.

In the case at bar, the City acted in good faith and had a reasonable legal basis for refusing to give Plaintiff any participation in the retirement system, sick leave credit and vacation credit for his employment from June 30, 1968 to June 2, 1973. The City's legal reasoning was sound and its response to the Plaintiff was in good faith. Nothing presented to this Court evidences bad faith or an unreasonable response to the taxpayer warranting a punitive award of attorney fees.

II. JURISDICTION TO AWARD ATTORNEYS' FEES IN TAXPAYER'S ACTION

Section 733.61, Ohio Revised Code, provides in pertinent part:

> In such case, the taxpayer shall be allowed his costs, and, *if judgment is finally ordered in his favor,* he may be allowed, as part of the costs, a

> reasonable compensation for his attorney. (Emphasis added.).

In *Schantz vs. City of Dayton*, Case No. CA-7047 (Montgomery Cty., May 27, 1981), the Court of Appeals construed R.C. § 733.61 to require an entire case, including the appellate process, to have been completed (i.e. – judgment having been finally ordered in a taxpayer's favor) before an allowance of attorney's fees is appropriate. *Id.* at p. 5. A copy of the *Schantz* opinion is attached hereto for the benefit of the Court. In *Schantz*, the Court of Appeals held that upon completion of the appellate process, the trial court is vested with the duty and responsibility "to determine the availability and, in its discretion, the appropriateness and amount of attorney's fees reasonably incurred in securing a final judgment." *Id.* Therefore, absent final judgment, including the appellate process, in this case, this trial court lacks the jurisdiction to determine the availability of attorneys' fees which should be reasonably incurred in this action.

III. CIVIL RIGHTS ACTION

Plaintiff has also applied for an award of attorneys fees pursuant to 42 U.S.C. § 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . , or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, . . . , a reasonable attorney's fee as part of the costs.

In its judgment entry, the Court found that the Plaintiff was entitled to participate as a matter of law in the retirement system and to sick leave and vacation credits by virtue of his classified civil service status from June 30, 1968 to June 2, 1973. However, this Court did not find that the City had deprived the Plaintiff of a property right implicating a right to a due process hearing as a matter of federal constitutional law. *Parrott vs. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), *overruled in part on other grounds, Daniels vs. Williams,* 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986). In *Parrott,* the United States Supreme Court cautioned that nothing in the Fourteenth Amendment protects against all deprivations of life, liberty, or property by the State. That Amendment protect only against deprivations "without due process of law." *Campo vs. New York City Employees Retirement System,* 843 F.2d 96 (2d. Cir. 1988). Absent any finding that the plaintiff has been denied any constitutional protected property right without due process of law, the Court has not found a violation of 42 U.S.C. § 1983. Consequently, Plaintiff is not entitled to an award of reasonable attorneys fees as part of the cost pursuant to 42 U.S.C. § 1988.

CONCLUSION

Plaintiff has brought this action for his own benefit and not in a public capacity for the taxpayer of the City of Cincinnati. The remedies which he has pursued have been for his own benefit and no public benefit has inured. The City has resisted these asserted claims in good faith and with a reasonable belief in the propriety of its legal arguments. Therefore, no punitive award of attorneys' fees should be imposed absent any determination of a

substantial public benefit. Further, no award can be made until the appeal of the judgment has been exhausted. Finally, Plaintiff has not been deprived of any constitutionally protected property interest without due process of law. Accordingly, no statutory basis is now presented to the Court in this action upon which the Court may award attorneys' fees. The motion for such fees should, therefore, be denied.

Respectfully submitted,

/s/ Fay D. Dupuis
FAY D. DUPUIS (D-802)
Acting City Solicitor

/s/ James F. McCarthy, III
JAMES F. McCARTHY, III
(M-524)
Assistant City Solicitor
Trial Attorney for Defendant
City of Cincinnati
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
Telephone: (513) 352-3340

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Memorandum Contra Motion for Attorney's fees has been hand delivered to Andrew S. Lipton, attorney for Plaintiff, Manley, Burke & Fischer, 225 West Court Street, Cincinnati, Ohio 45202, on this 14th day of January, 1991.

/s/ James F. McCarthy, III
JAMES F. McCARTHY, III
Assistant City Solicitor

JFM/bjs
BDH-001

Citation Not Reported in N.E.Rs | Rank(R) R 9 OF 14 | Database Mode OH-CS P
(Cite as: 1981 WL 2810 (Ohio App.))

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

ADAM SCHANTZ, III, et al, Plaintiffs-Appellees
CITY OF DAYTON, OHIO Defendant-Appellant
CASE NO. CA-7047.
Court of Appeals of Ohio, Montgomery County.
May 27, 1981.

IRVIN G. BIESER, JR. and GREGORY P. DUNSKY of BIESER, GREER & LANDIS, Gem Plaza, Third and Main Street, Dayton, Ohio 45402 Attorneys for Plaintiff-Appellee Fred G. Schantz.

THOMAS G. PETKEWITZ, Director of Law, By: J. ANTHONY SAWYER, Chief, Civil Division, City of Dayton, Department of Law. 101 W. Third Street, P.O. Box 22, Dayton, Ohio 45401 Attorney for Defendant-Appellant.

OPINION

BROGAN, J.

*1 In 1917 Adam and Mary Schantz donated approximately fifty acres of land to the City of Dayton. While the deed contained no restrictions on the use of the property, Mr. and Mrs. Schantz did express a desire to have the property preserved in its natural state in perpetuity as a recreational area. The Schantz children, Adam,

III and Gertrude Schantz Weng, provided an additional gift of approximately three acres to the city in 1955. These two conveyances are presently known as Waldruhe Park.

At the time of the initial gift the City Commission adopted Resolution 583, which directed that the park be cared for in such a manner as to preserve its forest and natural beauty.

In 1978 the administrative branch of the city government instituted a "forestry management program." Pursuant to this program the City of Dayton sought bids regarding the sale of 133 of the larger standing trees in Waldruhe Park. Thereafter, it became apparent that the city intended to execute a contract with Southwest Ohio Hardwood Company ("Southwest") for the cutting down and removal of the designated trees. Both parties apparently considered this to be a sale of personal property.

On January 23, 1979 the attorneys for the Adam Schantz family sent Mr. Thomas Petkewitz, Director of Law for the City of Dayton, a letter noting purported compliance with R.C. **733.59** and requesting that he apply for an injunction under R.C. **733.56** to prohibit the city from entering into a contract for the cutting down of trees in Waldruhe Park. No action was taken by Mr. Petkewitz.

On January 29, 1979, following the City's decision on the request, Adam, III, Gertrude and a cousin, Fred Schantz, filed a complaint and a motion for a temporary restraining order in the Montgomery County Court of Common Pleas in an attempt to prevent the destruction of the trees in the park.

The court granted the motion for a temporary restraining order and scheduled a hearing to consider the appropriateness of a permanent injunction.

On March 6, 1979 the court determined that Adam Schantz, III and Gertrude Schantz Weng, as heirs of Adam Schantz and donors of a portion of the property in issue, did not establish a basis for relief. The deeds to the city transferred the property to the city without restriction, specifically acknowledging that the desire expressed therein were in no way binding upon the city.

However, the action properly was brought as a taxpayer's suit by Fred Schantz. The court found no significant difference between the pertinent provisions of the Ohio Revised Code and the Charter of the City of Dayton. The requirements for bringing the taxpayer's action were met under both standards.

Turning to the merits of the case, the court concluded that the subject matter of the contract between the city and Southwest consisted of standing timber, which, in Ohio, was considered real property. Therefore, the contract was void for failure to comply with R.C.G.O. 36.40 in that the City Commission had not declared the trees to be unnecessary or unsuitable for public use. Without such declaration, the trees could not be sold.

*2 The court also determined that the contract violated Resolution 583 in that a number of large, mature and healthy trees had been selected for sale solely to increase the commercial attractiveness of the offer to potential buyers. Thus, the mandate of the resolution, i.e. – the preservation of the forest and natural beauty of the property, was not honored by the city's action.

The court permanently enjoined the city and Southwest from executing the purported contract regarding the trees in the park or any contract not made in full compliance with the law.

Thereafter, Fred Schantz moved for an allowance of reasonable attorney's fees, pursuant to R.C. **733.61** and City of Dayton Charter Sec. 64. On April 23, 1979, in view of the fact that a Notice of Appeal had been filed by Southwest, the court overruled the motion. The court acknowledged that Mr. Schantz could renew the motion following determination of the appeal.

This court affirmed the decision of the trial court in Schantz v. City of Dayton, CA 6358, Montgomery County Court of Appeals (March 27, 1980).

Subsequently, Mr. Schantz renewed his motion for attorney's fees. The city of Dayton submitted a motion (incorporating a previously filed memorandum) in opposition to the payment of attorney's fees.

Hearings on this issue were held on June 24, 1980 and September 4, 1980.

In a decision filed September 22, 1980, the court charged the city with the attorney's fees incurred in the presentation of the taxpayer's case at both the trial and appellate level.

The City filed a Notice of Appeal on October 20, 1980. Appellant has set forth a single assignment of error, as follows:

"THE TRIAL COURT COMMITTED REVERSIBLE PREJUDICIAL ERROR AGAINST THE DEFENDANT-APPELLANT BY ORDERING THE PAYMENT OF

ATTORNEY'S FEES, ESPECIALLY IN THE AMOUNT REQUESTED."

Initially, Appellant argues that the trial court could not determine the issue of attorney's fees in view of Appellee's failure to comply with R.C. **733.59.** The letter sent to the city director of law requesting him to apply for an injunction did not specify any particular person as making the request and, therefore, did not indicate that a taxpayer of the City of Dayton was linked to the request. These facts, Appellant asserts, constitute a jurisdictional defect which invalidates the court's authority to consider any issue in connection with this matter, including attorney's fees.

R.C. **733.56** provides, in pertinent part, that,

"The village solicitor or city director of law shall apply, in the same of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain . . . the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it. . . . "

In conjunction therewith, R.C. **733.59** establishes that,

"If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections **733.56** to **733.58** of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation." [FN1]

FN1 The City of Dayton Charter includes provisions analogous to R.C. **733.56** and **733.59,** as follows:

> "Sec. 59. The City Attorney shall apply, in the name of the city, to a court of competent jurisdiction for an order of injunction to restrain . . . the execution or performance of any contract made in behalf of the city in contravention of law. . . .
>
> Sec. 62. In case of the City Attorney, upon written request of any taxpayer of the city, fails to make any application provided for in the preceding three sections (analogous to R.C. **733.56, 733.57** and **733.58**), such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the city. No such suit or proceeding shall be entertained by any court until such request to the City Attorney shall first have been made. . . . "

*3 Thus, it is evident that a written request from a specific taxpayer to the city director of law coupled with the director's refusal or failure to act will enable such taxpayer to institute an action on behalf of the municipal corporation. Of course, the director must be given sufficient time to respond to the request. Nunnold v. City of Toledo, 52 Ohio App. 172, 3 N.E. 2d 550 (1935); Ampt v. City of Cincinnati, 2 Ohio N.P. (n.s.) 489, 15 Ohio Sec. 237 (1904).

However, these statutes are remedial in character and must be construed liberally to effectuate their purposes as well as assist persons in obtaining justice. R.C. 1.11. Thus, contrary to Appellant's assertions, strict adherence to the procedural aspects of R.C. **733.59** is not an absolute prerequisite to the maintenance of an action thereunder.

Where it is clear that the director has been sufficiently apprised of a relevant situation and has refused,

expressly or implicitly, to act in order to remedy the situation, a written request has not been required. State ex rel. White v. Cleveland, 34 Ohio St. 2d 37, 295 N.E. 2d 665 (1973); State ex rel. Nimon v. Springdale, 6 Ohio St. 2d 1, 215 N.E. 2d 592 (1966). In such cases the necessity of sending a written request has been deemed to have been waived.

Logically, under similar circumstances, technical defects in a request sent to a city director of law also must be deemed to have been excused. The substantive requirements of R.C. **733.59** are that which are of overriding significance. Where, as in the present case, the city director of law has received a request to exercise his authority under R.C. **733.56** and unconditionally refuses to comply with such request a taxpayer, relying on such refusal, may institute an action pursuant to R.C. **733.59.**

Alternatively, Appellant maintains that the Ohio Revised Code has no application where a city charter is involved. Therefore, the city was under no obligation to act when presented with a demand under R.C. **733.59**

Appellant's claim is premised upon Article 18, sections 3 and 7, of the Ohio Constitution, which provide that,

Sec. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to

the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

However, the authority granted to municipalities by these sections does not establish the preeminence of city charters in matters pertaining to the jurisdiction of the courts. In fact, to the extent that charter provisions are in conflict with jurisdictional statutes such provisions are invalid. Cupps v. City of Toledo, 170 Ohio St. 144, 163 N.E. 2d 384 (1959). Thus, R.C. **733.59** is the standard by which courts assume jurisdiction in taxpayers actions. City directors of law may choose not to act on a request under R.C. **733.59** but the courts may assume jurisdiction of an action subsequently brought under the statute by a taxpayer. [FN2]

> FN2 Courts may assume jurisdiction of taxpayer actions under City of Dayton Charter Sec. 62 as well in that it is consistent with R.C. **733.59**

*4 Therefore, the Montgomery County Court of Common Pleas has jurisdiction to determine the issues presented in this matter and, consequently, had the authority to consider Appellee's request for attorney fees. [FN3]

> FN3 Appellant also maintains that Appellee's failure to indicate on the original complaint that he was bringing the action on behalf of the city was fatal to the trial court's jurisdiction. As has previously been indicated in Schantz v. City of Dayton, CA 6358, Montgomery County Court of Appeals (March 27, 1980), we see no merit in this contention.

However, Appellant contends that attorney's fees were not prayed for in Appellee's original complaint.

Therefore, such lack of notice to the city must be deemed to prohibit an award of attorney's fees in this case.

R.C. 733.61 provides as follows:

"If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney." (Emphasis added.). [FN4]

FN4 In almost identical language City of Dayton Charter Sec. 64 establishes that,

> If the court hearing any such action be satisfied that the taxpayer had good cause to believe his allegations were well founded, or that they are sufficient in law, it shall make such order as the equity and justice of the case demand. In such case the taxpayer shall be allowed his costs, and if judgment be finally entered in his favor, he may be allowed as part of the costs a reasonable compensation for his attorney.

Thus, the statute itself places the municipal corporation on notice that a successful taxpayer action under R.C. 733.59 may result in an award of reasonable compensation to the taxpayer's attorney.

In addition, Appellee's complaint included a request for "costs herein expended and for such other relief as to

the court may seem just an equitable." Reasonable compensation to a successful taxpayer's attorney, pursuant to statute, may be assessed as part of such request for costs.

We see no merit in Appellant's contention.

Appellant next claims that Appellee failed to demonstrate that he incurred any attorney's fees. This position is based on the assertion that Appellee was merely an accomodation party. The real parties were Adam Schantz, III and Gertrude Schantz Weng.

Adam, III and Ms. Weng, as heirs and donors of the property constituting Waldruhe Park, properly were found not to have established a basis for relief. Therefore, they in fact were not entitled to the direct and distinct benefit of R.C. 733.61.

However, it has been decided that this matter was properly presented to the court as a taxpayer's action by Appellee. Judgment was finally ordered in his favor and, consequently, the court could permit a reasonable compensation for his attorney as part of his costs.

*5 Had these three persons retained separate counsel this issue would have been resolved easily. However, each was represented by the same counsel. Therefore, it was incumbent upon the trial court to examine the information supplied concerning attorney's fees to determine whether any fees were assessed for services rendered for the sole benefit of Adam, III and Ms. Weng. Such fees could not be included as costs of the taxpayer's action. Fees related to the presentation of the case as a taxpayer's action by Fred Schantz, however, were recoverable

despite benefit unavoidably conferred upon Adam, III and Ms. Weng as well.

It does appear that the trial court may not have considered the distinguishability of benefits received by each plaintiff in this action.

As a further argument against the allowance of attorney's fee Appellant contends that the trial court lacked authority to render an award of attorney's fees for services rendered at the appellate level. The power to determine the fairness and appropriateness of such fees assertedly rests solely with the appellate court.

We are not persuaded by Appellant's claim. R.C. **733.61** requires an entire case, including the appellate process, to have been completed (i.e. – judgment having been finally ordered in a taxpayer's favor) before an allowance of attorney's fees is appropriate. At that time, it becomes the duty of the trial court to determine the availability and, in its discretion, the appropriateness and amount of attorney's fees reasonably incurred in securing a final judgment. The trial court is fully capable of ascertaining the reasonableness of fees incurred at all levels of the judicial system.

To adopt Appellant's position would be to require a taxpayer to request separate allowances of attorney's fees from each court to which a case was presented. Such a task is not intended by the statute and wholly inequitable.

However, Appellant also argues that the trial court lacks authority to allow attorney's fees at the appellate

level in that, in this case, Appellant did not institute or participate in the previous appeal.

The purpose of the statute is to reimburse taxpayers for their expenses in asserting a right where it reasonably appears that the municipality should have assumed such obligation. See e.g., Fairbanks, Morse & Co. v. Hill, 48 Ohio App. 418, 194 N.E. 397 (1934). Thus, regardless of whether the municipality opposes a taxpayer on appeal, a taxpayer who successfully asserts a public right may be compensated, in the discretion of the trial court, for his efforts in the form of attorneys fees.

Appellant argues that no **public benefit** resulted from the action, i.e. – that the action was filed solely for the protection of the private interests of Adam Schantz, III and Gertrude Schantz Weng.

It is uncontroverted that the public must obtain some benefit from an action before payment of the taxpayer's attorney's fees is permissible. Brauer v. City of Cleveland, 7 Ohio St. 2d 94, 218 N.E. 2d 559 (1966). The benefit to the public need not always be monetary in character but, "may be of a more intangible character, such as the prevention of illegal government activity." Billington v. Cotner, 37 Ohio St. 2d 17, 19, 305 N.E. 2d 805, 807 (1974).

*6 In addition, we agree that if Adam Schantz, III and Ms. Weng had succeeded in securing a favorable determination of their rights, the fact that they had standing only to argue the merits of their private rights as heirs to Adam Schantz and donors of the relevant property would have prohibited the allowance, pursuant to R.C. **733.61**, of attorney's fees incurred solely for their benefit.

However, the successful maintenance of the taxpayer's action by Fred Schantz did benefit the public. Activity by the City of Dayton, i.e. – including in an offer for the sale of trees in Waldruhe Park certain trees solely for effect on the commercial attractiveness of the sale as a whole, was determined to be violative of Resolution 583. In addition, the city's action were found not to be in compliance with R.C.G.O. 38.40. Appellee asserted no rights other than those of a taxpayer.

Therefore, an allowance of reasonable attorney's fees to be paid by the municipality was, pursuant to R.C. 733.61, within the discretion of the trial court.

However, Appellant maintains that the trial court failed to consider all the legally required factors before exercising its discretion to grant attorney's fees to Appellee. The court allegedly failed to consider that a fund had not been created or preserved by this action.

The existence of a fund is not a prerequisite to an allowance of attorney's fees but, simply a factor for consideration by the court in exercising its discretion. Brauer v. City of Cleveland, 7 Ohio St. 2d 94, 218 N.E. 2d 599 (1966). It appeals that the court was aware of this fact and must be presumed to have considered the impact of the lack of a fund on the propriety of granting attorney's fees to Appellee. Appellant has not shown that such presumption was inappropriate in this case.

Finally, while conceding that the attorney's fees requested were reasonable for services rendered by a private law firm, Appellant claims that in determining the reasonableness of the fees incurred the court must consider the doctrine of Guckenberger v. Dexter, 18 Ohio

C.C. 244, 246, 10 Ohio Cir. Dec. 174, 176 (1899), which is as follows:

"Compensation for the performance of public duties is not expected to be as high as that paid by individuals, and in allowing compensation under this provision, what is allowed public officers for the performance of like duties should be borne in mind."

However, the court did consider Guckenberger, specifically pointing out in its Decision and Order of September 22, 1980 that,

"The Court has reviewed Guckenberger v. Dexter. . . . Guckenberger v. Dexter is an 1899 Hamilton County Circuit Court case which does not necessarily control in this situation. The counsel fees charged the original plaintiffs by their counsel in this case certainly do not represent net profit to counsel and will be considerably diminished by the overhead expenses of a downtown Dayton law offices. Secondly, the Court has no evidence of what compensation for a 'public officer for the performance of like duties' would be, and certainly such compensation is not subject to the overhead burden that compensation of private counsel is subject to. Finally, the Guckenberger court was concerned with making sure that 'compensation under this provision should never be so large as to possibly invite litigation whose purposes might be the compensation allowed by this section.' There is no suggestion from anyone that the litigation involving Waldruhe Park was motivated by the possibility that the plaintiff, if successful, would obtain attorney fees."

*7 It appears that the court properly assessed the value of Guckenberger. R.C. **733.61** does not limit the

allowance of attorney's fees to that which a public official would have received had he properly undertaken the obligation of enforcing a public right. While such information may be of assistance to the court, the only restriction on the court's exercise of discretion is that the attorney's fees awarded are reasonable. Thus, the court may allow a taxpayer compensation for his attorney which is conceded to be reasonable for services rendered by a private firm.

In so far as the trial court may not have considered the separability of the fees incurred by Appellee from those of Adam Schantz, III and Gertrude Schantz Weng, it should be noted that Adam Schantz and Ms. Weng were dismissed very early in the litigation as appropriate parties. While the trial record is somewhat unclear, this Court cannot say that the allowance of attorneys fees in the amount allowed by the trial court was not reasonable. Much discretion is given the trial court and this Court will not substitute its discretion for that of the trier of fact. Billington v. Cotner, supra.

Judgment is affirmed.

KERNS, P.J. and PHILLIPS, J., concur.

Ohio App., 1981.
SCHANTZ v. CITY OF DAYTON.
1981 WL 2810 (Ohio App.)
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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of the Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205 (c), Oct. 21, 1980, 94 Stat. 2330.

733.59 Suit by taxpayer

If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

733.61 Duty of court

If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they were sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation of his attorney.

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

No. 92-1111

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE CITY OF CINCINNATI AND
BOARD OF TRUSTEES RETIREMENT
SYSTEM AND SCOTT JOHNSON,

Petitioners,

vs.

THE CITY OF CINCINNATI, ex rel.
DAVID KUNTZ AND DAVID KUNTZ,

Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

Andrew S. Lipton, Esq.
(Counsel of Record)
Manley, Burke, Fischer & Lipton
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

Attorney for Respondent

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
A. The Court of Appeals Correctly Held That Respondent Was Entitled to Attorney Fees Pursuant to 42 U.S.C. Section 1988 Where Respondent Prevailed on His Pendent State-Law Claim. ...	5
B. The Decision of the Court of Appeals is in Accordance With Maher v. Gagne, and 42 U.S.C. Section 1988. ...	15
CONCLUSION	22

TABLE OF AUTHORITIES

	PAGE
Board of Regents v. Roth 408 U.S. 564 (1972)	10,11
Delta Airlines v. August, 450 U.S. 346, 362 (1981)	17
Doe v. Cuddy, 21 Ohio App.3d 270, 47 N.E.2d 914 (Hamilton Cty. 1985)	8
Gonzalez v. New Mexico Educational Retirement Board, 788 P.2d 348 (M.M. 1990)	20-21
Gumbhir v. Kansas State Board of Pharmacy, 646 P.2d 1078 (Ka. 1982)	18,19
Hagans v. Lavine, 415 U.S. 528, 538 (1974)	7, 8, 13,18 21
Lofft v. State Board of Higher Education, 89 Ore. App. 614, 750 P.2d 515 (1987)	20
Luria Bros. & Co. v. Allen, 672 F.2d 347 (3rd Cir. 1982) ...	6
Maher v. Gagne, 448 U.S. 122 (1980)	1,5,7 15,17 19,21

PAGE

Raley v. Frazier, 747 F.2d 287 (5th Cir. 1984) 6

Reel v. Arkansas Department of Corrections, 672 F.2d 693 (8th Cir. 1952) 6

Roberts v. Mills, 628 P.2d 714, 175 (Or. 1981) 19,20

Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977) 8,19

United Mine Workers v. Gibbs 383 U.S. 715 (1966) 7

O.R.C. Section 733.59 15

O.R.C. Section 733.61 4

42 U.S.C. Section 1983 ..... 12,13 14,15 16

42 U.S.C. Section 1988 ..... 4,5,7 12,15

To fashion their issues for review, petitioners misstate the record and distort the law. At best, the issue raised by petitioners is whether the facts of this case satisfy the test set out by this Court in Maher v. Gagne, 448 U.S. 122 (1980) which the Court of Appeals below faithfully applied. The question whether any given case meets a well-settled standard obviously does not warrant this Court's attention. Such a case-specific inquiry is even less justified where, as here, petitioners failed to raise the issue below. In any event, the Court of Appeals found that the appropriate standard had been met and the Supreme Court of Ohio concurred. Further review would be a waste of judicial resources.

STATEMENT OF THE CASE

The underlying facts in this case are not before this Court since petitioners did not appeal the unanimous lower court rulings in respondent's favor on the liability issues. Briefly, respondent David Kuntz, a former city employee, was hired by the City of Cincinnati Health Department as a project administrator under a series of contracts for the period from June, 1968 through June, 1973. In June of 1973, respondent Kuntz was granted civil service status with the City of Cincinnati and given the classification of business manager in the City Health Department.

On February 12, 1987, the City's Civil Service Commission granted Mr. Kuntz's request for civil service status

for the period from June 30, 1968, through June 2, 1973; determined that respondent was a "classified employee"; and ordered that his personnel record be changed to reflect "classified" civil service status. The City did not appeal the Commission's finding.

When respondent sought the retirement benefits, sick leave and vacation credit to which he was entitled as a civil service employee, the City refused his request. As a result, respondent filed a complaint seeking the benefits to which he was entitled under the Civil Service Commission decision. The City then requested reconsideration of the Civil Service Commission's decision. However, the Commission refused to alter its prior decision and denied the City's request for

reconsideration. The trial court then granted respondent all of the substantive relief that he sought. (Petitioners' Appendix 84A-86A.)

Upon respondent's motion, the lower court declined to award attorney fees pursuant to Section 733.61 of the Ohio Revised Code or 42 U.S.C. Section 1988. The Court of Appeals upheld the denial of attorney fees pursuant to Section 733.61 of the Ohio Revised Code but found that an award was proper pursuant to 42 U.S.C. Section 1988. The Ohio Supreme Court denied petitioners' request for discretionary review. The only issue presented to this Court is whether attorney fees should have been awarded pursuant to 42 U.S.C. Section 1988.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Correctly Held That Respondent Was Entitled to Attorney Fees Pursuant to 42 U.S.C. Section 1988 Where Respondent Prevailed on the Pendent State-Law Claim.

The petitioners request a Writ of Certiorari to review whether the Court of Appeals correctly awarded respondent attorney fees pursuant to 42 U.S.C. Section 1988 and Maher v. Gagne, 448 U.S. 122 (1980), and its progeny. It is clear from the record that the Court of Appeals properly awarded attorney fees. The court held that there was a "nexus" between respondent's state-law claims and constitutional claims and that such claims were "substantial."

Petitioners argue that respondent lost on the merits of his Section 1983 claim and that attorney fees must therefore be denied. (See Petition at 7 citing Raley v. Frazier, 747 F.2d 287 (5th Cir. 1984); Luria Bros. & Co. v. Allen, 672 F.2d 347 (3rd Cir. 1982); Reel v. Arkansas Department of Corrections, 672 F.2d 693 (8th Cir. 1952).) Although petitioners correctly summarize the law to be applied where a Section 1983 claim is lost, they have misstated the record in a way flatly contradicted by the findings of the Court of Appeals.

There is no disagreement that courts have consistently held that, where a plaintiff brings a state-law claim and a federal claim, and then fails on the federal claim, the plaintiff is not

entitled to attorney fees under 42 U.S.C. Section 1988. See, e.g., Maher v. Gagne, 448 U.S. at 133, n.5. That principle was recognized by the Court of Appeals here. However, the appellate court found that respondent had not failed on his Section 1983 claim, but, rather, that the lower court had not ruled upon it. Under these circumstances, a very different standard applies. In Maher, this Court reaffirmed the substantiality test recognized in Hagans v. Lavine, 415 U.S. 528 (1974); and United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Under this test, fees may be awarded under Section 1988 where the federal claim, though not ruled upon, is substantial and arises out of a "common nucleus of operative fact" with

the state law claim upon which the plaintiff prevailed.[1/]

The Court of Appeals applied this substantiality test here, citing its own earlier decision in Doe v. Cuddy, 21 Ohio App.3d 270, 487 N.E.2d 914 (Hamilton Cty. Ct. App. 1985); and Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977).

1/ Under the substantiality test, a federal claim is substantial unless "it is obviously without merit or ... its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Hagans v. Lavine, 415 U.S. 528, 537 (1974). The Court of Appeals cited this standard in addressing the substantiality issue here. (Petitioners' Appendix 55A.)

The Court found that both prongs of the substantiality test had been met. First, the Court noted that respondent's claims arose out of a "common nucleus of operative facts." (Petitioner's Appendix 58A.) Specifically, the City had denied respondent retirement benefits, sick leave and vacation credit although he was entitled to these benefits pursuant to the City's Civil Service Commission decision awarding him classified civil service status for the time period in question. Respondent alleged that he was denied property interests and benefits to which he was entitled without due process of law in violation of the 14th Amendment. Mr. Kuntz's state and federal claims both arose because of the City's failure to provide him with benefits to which he was entitled under the law.

Even petitioners do not dispute that the facts of the federal claim arose out of a common nucleus of operative fact with the state-law claim. Indeed, the facts underlying both the state law and federal constitutional claims were identical.

The Court of Appeals also found that respondent met the second prong of the test in that his federal claim was substantial. (Petitioners' Appendix 58A-59A.) In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court recognized that "an individual has a constitutional property interest where there is a legitimate claim of entitlement to it." According to the Court,

> Property interests ... are created and their dimensions are defined by existing rules or understandings that

> stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.

Board of Regents v. Roth, supra, 408 U.S. at 577.

Here, the trial and appellate courts held that City ordinances supported respondent's legitimate claim of entitlement to retirement benefits, sick leave and vacation credit. Clearly, this created a constitutionally protected property interest in these benefits. The denial of such benefits by the City was both procedurally and substantively infirm under both state and federal law.

In order to contrive a legal issue for review, petitioners repeatedly state that the trial court ruled against

respondent on his federal claim. (See Petition at 7-8.) This is simply not true. Conspicuously absent from the decisions of the trial court is any such ruling. To the contrary, the trial court granted respondent's motion for summary judgment and ordered all of the relief sought. In subsequently denying respondent's motion for attorney fees, the trial court merely stated:

> The court did not grant summary judgment to plaintiff on his alleged claims brought under 42 U.S.C. Section 1983; therefore, plaintiff is not entitled to an award of reasonable attorneys' fees pursuant to 42 U.S.C. Section 1988.

(Petitioners' Appendix 37A.) While the trial court noted that it did not grant relief on the basis of respondent's

federal claims, the court did not state that it denied those claims. In light of the fact that respondent could be (and was) granted all relief requested under his state law claims, there was simply no need to decide the constitutional claim. The trial court's action in deciding the non-constitutional claim first, so that a decision on the federal constitutional claim was not necessary, comports with general practice. See Hagans v. Lavine, 415 U.S. 528, 547 (1974).

Petitioners fail to acknowledge that they filed their own motion for summary judgment challenging respondent's right to recover under federal or state law. That motion was denied. (Petitioners' Appendix 39A.) Had the trial court decided that respondent's Section 1983 claim had no merit, as petitioners would

have this Court believe, petitioners' motion would have been granted, at least in part. The fact that their motion was denied in full belies petitioners' contention that the trial court affirmatively ruled against respondent on his federal claim.

Petitioners also argue that respondent is not entitled to attorney fees under Section 1983 since his state-law claim supposedly allowed for an award of fees. (Petition at 11.) Once again, petitioners have erred. It is quite clear that respondent's state-law claim did not allow for attorney fees. Mr. Kuntz sought a declaratory judgment and injunctive relief relating to benefits arising under the Cincinnati Municipal Code. However, neither the municipal code nor state law provides for

an award of attorney fees to an employee deprived of benefits vested under state or local law. Respondent sought fees under Ohio Revised Code Section 733.59, which permits an award of attorney fees in a proper taxpayer action. However, both the trial and the appellate courts held that respondent did not fall within the jurisdiction of the taxpayer statute. Thus, while respondent sought attorney fees under the taxpayer statute, the substantive state-law claims did not arise, nor were they resolved, under that statute.

B. The Decision of the Court of Appeals is in Accordance With Maher v. Gagne and 42 U.S.C. Section 1988.

As noted above, petitioners have repeatedly argued that respondent was not entitled to attorney fees because he had lost his Section 1983 claims. Finding no

success with that argument, petitioners now argue, for the first time to this Court, that respondent's Section 1983 claim was not substantial[2/] and that

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2/ Curiously, even now petitioners fail to articulate any basis for their challenge to respondent's Section 1983 claim. All they argue is that respondent failed to prove official policy. (Petition at 14, n 1.)

However, the pleadings themselves, without even having to turn to the evidence, resolve this issue. For example, petitioners admitted the allegation that the City's Retirement Board is responsible for the general administration of the retirement system (Amended Complaint ¶ 3; Answer ¶ 2.) More particularly, petitioners admitted that the Retirement Board had "final authority" when it "exercised its authority" to deny benefits to Mr. Kuntz. (Eighth Defense, Answer ¶ 38.) Petitioners also admitted that they "at all times acted in their official capacities with legal justification and/or excuse." (Seventeenth Defense, Answer ¶ 47.) Thus, even this paltry effort to establish lack of substantiality ignores petitioners' own admissions.

the Ohio courts are somehow in conflict with other state court decisions. Clearly, petitioners should not be permitted to raise these issues for the first time to this Court. Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not before Court of Appeals is not properly before the Supreme Court).

Although petitioners claim that there is a conflict among the state courts, no such conflict exists. As Justice Powell noted in his concurring opinion in Maher, once a federal claim is found to be substantial, it is not necessary to look behind that decision to further evaluate the constitutional claim. 448 U.S. at 134. In fact, to do so would put the court in the business of rendering advisory opinions. To avoid

this burden, the Hagans standard (see footnote 1) has been consistently followed.

Finally, even a cursory examination of the petitioners' theory that three lines of cases exist among the state courts shows that it is misguided. Virtually every court that has discussed the issue applies the substantiality test, just as the Court of Appeals did in the present case.

Petitioners cite only one state court decision to support their claim that there is a line of cases that requires plaintiffs to show that their Section 1983 claim is "meritorious." (See Petition at 13, citing Gumbhir v. Kansas State Board of Pharmacy, 646 P.2d 1078 (Ka. 1982).) However, in Gumbhir, the plaintiff had not even pleaded a

Section 1983 claim. In deciding to nonetheless consider the plaintiff's Section 1988 claim for fees, the court discussed and followed both Maher v. Gagne, 448 U.S. 122 (1980); and Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977). (See 646 F.2d at 1086.) The court then denied fees because "the state claim upon which Gumbhir prevailed below did not involve a common nucleus of operative facts with a substantial federal claim." 646 P.2d at 1090.

Similarly, petitioners' claim that there is a line of cases holding that attorney fees should not be granted if there is an adequate remedy under state law (Petition at 13) is equally inaccurate. Petitioners cite only two cases in support of this theory. Roberts v. Mills, 628 P.2d 714, 715 (Or. 1981),

involved a Section 1983 claim that the court held was "superfluous." Later, the Court of Appeals in Lofft v. State Board of Higher Education, 89 Ore. App. 614, 750 P.2d 515 (1987), explained the Roberts decision, noting that the complaint included only a "bare reference" to Section 1983, essentially finding that the claim was not substantial. The court in Lofft then held that where an employee brought both a state-law claim and federal claim for wrongful termination, and then prevailed on the state-law claim, he was entitled to attorney fees pursuant to 42 U.S.C. Section 1988. Lofft v. State Board of Higher Education, 89 Ore. App. 614, 89 Ore. App. at 616-617; 750 P.2d at 516.

Gonzalez v. New Mexico Educational Retirement Board, 788 P.2d 348 (N.M.

1990), also relied upon by petitioners, likewise lends no support to their cause. There the court held that plaintiffs' suit "at bottom was to interpret and apply" agency rules "to determine their validity in light of the governing state statutes." Gonzalez v. New Mexico Educational Retirement Board, 788 P.2d 348, 351 (1990). Once again, there was simply no substantial federal issue before the court.

On the other hand, this case clearly presents a substantial federal claim, as the Court of Appeals held. Moreover, respondents should not be permitted now, for the first time, to question the substantiality of respondent's federal claim or to urge a standard other than that required by Hagans and Maher when they failed to do so below.

The Ohio courts here followed relevant Supreme Court decisions and settled law in deciding that respondent is entitled to an award of attorney fees. Furthermore, there are no conflicts among the state courts to be resolved and no outstanding questions to be answered.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Andrew S. Lipton
(Counsel of Record)
Manley, Burke, Fischer & Lipton
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorney for Respondent

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